Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

PIRATE INVESTOR LLC AND FRANK PORTER STANSBERRY,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent brought this action against petitioners under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, which prohibit false statements "in connection with the purchase or sale of any security." The suit arises from petitioners' investment newsletter advisory. Petitioners offered no personalized investment advice, did not trade in the relevant stock, and owed no fiduciary duty to the issuer or any other party. The Fourth Circuit nonetheless held that petitioners could be held liable under Section 10(b), and the court affirmed both a significant monetary fine and an injunction broadly prohibiting any future violation of the Rule. The court of appeals further held that the First Amendment presented no obstacle to respondent's claim. By contrast, in a parallel state law securities fraud investigation brought by the State of Maryland over the *identical* statement, that state's highest court held that constitutional protections applied.

The Questions Presented are:

1. Whether Section 10(b) and Rule 10b-5 apply to speech by a party that offers no personalized investment advice, does not trade in the relevant stock, and owes no applicable fiduciary duty.

2. Whether such a case may proceed without the protections of the First Amendment, such as independent appellate review of factual findings, a showing of reckless disregard for the truth based on clear and convincing evidence, and a prohibition on sweeping prior restraints on speech.

CORPORATE DISCLOSURE STATEMENT

Pirate Investor LLC changed its corporate name to Stansberry & Associates Investment Research, LLC on October 24, 2005. Agora, Inc. is the parent corporation of Stansberry & Associates Investment Research, LLC. No publicly held company owns 10 percent or more of Agora, Inc. or Stansberry & Associates Investment Research, LLC.

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The decision of the United States Court of Appeals for the Fourth Circuit is reported at 580 F.3d 233 and is reprinted in the Appendix ("App.") at 1a. The decision of the United States District Court for the District of Maryland is unpublished and reprinted at App. 52a.

JURISDICTION

The Fourth Circuit entered its judgment on September 15, 2009 and denied rehearing on November 13, 2009. App. 151a. The Chief Justice subsequently extended the time to file this petition to and including March 26, 2010. App. 197-98a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The First Amendment to the U.S. Constitution provides in relevant part: "Congress shall make no law ... abridging the freedom of speech, or of the press ... ." U.S. CONST. amend. I.

Section 10(b) of the Securities Exchange Act of 1934 provides in relevant part: "It shall be unlawful for any person, directly or indirectly ... (b) To use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b).

Rule 10b-5 provides, in relevant part: "It shall be unlawful for any person, directly or indirectly ... (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

STATEMENT OF THE CASE

Petitioners advertised and published an investment newsletter advisory predicting that the price of a particular stock would rise. Petitioners did not trade in the stock; provided no personalized investment advice; and owed no applicable fiduciary duty. Alleging that a statement in the advisory was false, respondent charged petitioners with violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The district court and Fourth Circuit held that petitioners' speech was actionable and that the First Amendment was no obstacle to the claim. In parallel litigation, the highest court of Maryland held that the identical publications triggered First Amendment protections.

1. Petitioners publish investment advice. At the time of the events giving rise to this case, in May 2002, petitioner Pirate Investor LLC ("PIL") had approximately 20,000 subscribers. By trial in 2005, that number had risen to 120,000; it has roughly

doubled since. PIL is owned by Agora, Inc., which publishes dozens of investment, health, and travel newsletters. In May 2002, it had approximately 450,000 paid subscribers. By trial, that figure had grown to 650,000. Its book divisions include Les Belles Lettres and Pickering & Chatto, publishers of classics and academic texts.

Petitioner Frank Porter Stansberry is the editor of a PIL publication, *Porter Stansberry's Investment Advisory*. *Barron's* has cited Stansberry as a "highly regarded" writer who does not "mince his words" and commended him as "remarkably prescient" for his predictions of impending turmoil in the financial sector. *See* Alan Abelson, *Au Revoir or Goodbye?*, BARRON'S, July 14, 2008, at 5.

The particular segment of the publishing industry in which petitioners participate is well known for its hyperbole. Jim Cramer of CNBC is a high-profile example. As the sub-headline on a *Worth* magazine article on this genre explains: "Welcome to the world of investing newsletters, where YOU HAVE TO SHOUT TO BE HEARD!" *See* Mike Steere, *The Genius, the Guru & the Grumpy Old Men*, WORTH, November 1996. For example, in June 2008, Freddie Mac and Fannie Mae were trading at $25.29 and $27.59, respectively. Stansberry, however, as noted by *Barron's*, exhorted his readers to short sell those stocks in a report entitled *Freddie Mac and Fannie Mae Are Going To Zero: How to Protect Yourself from the Greatest Financial Calamity of our Lives*. *See* PORTER STANSBERRY'S INVESTMENT ADVISORY, June 2008, available at http://www.stansberryresearch.com/

secure/psi/issues/html/200806PSI_issue.asp. By early September 2008, the stocks fell below $1.00 and have traded thereabout to this day.

This effort by respondent to extend the jurisdiction of Section 10(b) to the journalism of investment newsletters arises from Stansberry's reporting on USEC Inc., a public company that imports uranium for nuclear power plants through a joint U.S.-Russian program. In 2002, Stansberry interviewed USEC's head of investor relations, Steven Wingfield. Stansberry did not know much about USEC, but he was looking for growth companies to recommend to his subscribers. For over an hour, the two men discussed company fundamentals, USEC's prospects, and a pending pricing agreement with its Russian supplier that would cut USEC's costs for uranium and boost its earnings. They also spoke about an upcoming summit on May 23-25 between Presidents Bush and Putin, which USEC hoped would produce the required governmental approvals for the pricing agreement.

USEC had asked the U.S. government to place the pricing agreement on the agenda for the summit and in mid-April had raised with its creditor Bank of America a possible connection between the summit and the approval of the agreement. Handwritten notes on a Bank of America document observed: "Maybe May @ undersecretary levels." USEC's private confidence that the approval was imminent was reflected in its public statements as well. On April 25, USEC had told investors in a conference call that it was "look[ing] forward" to approval of the

agreement in the "near future" and that "signals from the U.S. government indicate that approval is near."

As his interview with Wingfield was ending, Stansberry said he would probably not include USEC as a recommended stock in his newsletter since it did not fit the growth-oriented technology enterprises he followed. According to Stansberry, Wingfield became agitated and blurted out something Stansberry remembers as the somewhat nebulous but impetuous statement: "Watch the stock on May 22nd."

Wingfield acknowledges every aspect of the interview as detailed by Stansberry except the "May 22nd" comment. He denies making that precise statement, but describes his recollection of the conversation as follows:

> Well, like virtually every call that I was taking during that time, that subject [of the agreement] did come up; and, to my recollection, I stayed very close to the language that we used in the conference call about a week before. And that is, that we were working closely with the government, and we were looking forward to approval in the near term. ... [T]here had been some news media coverage of the president's meeting with Putin ... he asked about it, and I said that I – we hoped something positive would come out of the deal.

Before Stansberry published anything based on his interview, USEC's stock began to climb when

President Bush announced from the Rose Garden that the U.S. had agreed to a new arms treaty with Russia. Stansberry came to see Wingfield's statements to reflect USEC's belief that the pricing agreement would be approved in conjunction with the summit, causing the stock market to wake up to the company's improved prospects. He decided to publish his insight because he thought that the world's focus on the Bush-Putin meeting and a possible signing at the summit would result in the revaluing of a "sleeper" stock and create a great opportunity for his readers. He wrote a special report on USEC to be published separately from his newsletter (the "Report") and a promotional e-mail marketing the Report to subscribers (the "E-mail"). He offered the Report for sale at $1,000, a price point that the evidence showed was accepted in the market for the advice of investment newsletters.

The E-mail described the reasons for investing in USEC but did not identify the company by name. It discussed the pending pricing agreement, the new arms treaty, the upcoming summit, and the signals coming from the company which Stansberry interpreted as indicating that the pricing agreement would be approved around the summit. "[B]est of all, because of my source – a senior company executive – I can tell you EXACTLY WHEN the deal will be finalized and announced to the public," Stansberry wrote. App. 157a. He colloquially captioned the E-mail a "'Super Insider' Tip" in what is (as noted above) the brassy, exuberant vernacular commonplace in the newsletter industry.

The four-page Report[1] identified USEC as the company and offered further analysis supporting Stansberry's prediction that the stock, then trading at half of book value, would double when the pricing agreement was approved. Consistent with his understanding of his interview with Wingfield, he wrote in the Report, "A USEC senior executive has assured me that the new Russian agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said 'watch the stock on May 22nd.'" App. 177a. Stansberry recommended buying the stock before that date to capture the gains he anticipated during the summit.

Stansberry published the E-mail on the evening of May 13 to a list of petitioners' subscribers. Just hours later, Stansberry sent Wingfield both the Report and the E-mail, together with a memorandum he wrote to other newsletter editors at Agora (the "Memorandum"). In the Memorandum, Stansberry stated, "About two weeks ago I stumbled onto some very good information (which is turning out to be correct) about a company called USEC that sells uranium." App. 180a.

Wingfield did not contact Stansberry to raise any concerns about the contents of the Report, the E-mail, or the Memorandum. Nor did USEC issue a press release denying Stansberry's reporting or correcting it as required by New York Stock

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[1] Because he was not recommending USEC in the newsletter that bears his name, Stansberry published the E-mail under a company pen name used regularly by petitioners to market their publications.

Exchange rules when a listed company believes that a public report contains materially-false statements. Only when respondent later deposed Wingfield did he deny that he had told Stansberry to "watch the stock on May 22nd."

Stansberry was far from alone in his views about USEC. Contemporaneous news reports attributed the movement in the company's stock price to a connection between the summit and the pricing agreement. On May 14, in an article entitled "USEC Up 13% on U.S.-Russia Deal To Cut Nuclear Warheads," *The Wall Street Journal* quoted Wingfield saying that "[t]he new pricing agreement will improve our earnings" and predicting approval "com[ing] along soon." On May 15, in an article entitled "USEC Up 10%: US-Russia Arms Deal Continues To Boost Stock," *The Wall Street Journal* quoted an analyst stating "[t]he hope is clearly that – as part of these other talks between the Russia [sic] and the U.S. – the governments will finally approve the tentative agreements USEC has with its Russian trading partner."

The approval of the pricing agreement was not announced on May 22. It was made official a few weeks later on June 19, when USEC's share price closed at $8.39. (It had opened at $6.85 on May 13.)

Unlike advertiser-supported media, newsletters depend on subscriber loyalty and readership renewal to sustain their growth. Because newsletter writers thus only succeed by building long-term relationships with subscribers, Stansberry would offer refunds to anyone who purchased the Report and was not fully

satisfied. Only 18 percent of the 1,217 readers who purchased the Report asked for a refund. Ninety percent of these customers bought a subsequent publication from petitioners or their parent publishing company Agora.

2. Respondent subsequently brought this action seeking monetary relief and an injunction against petitioners under Rule 10b-5, which implements Section 10(b) of the Securities Exchange Act of 1934 and forbids any material "untrue statement," as well as "fraud or deceit," "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. In *United States v. O'Hagan*, 521 U.S. 642, 656 (1997), this Court held that to meet the "in connection with" requirement fraud must "coincide" with or be "consummated" or "complete[d]" by the purchase or sale of a security. As the Court further explained in *SEC v. Zandford*, 535 U.S. 813, 821 (2002), fraudulent conduct must "require the sale of securities" to satisfy the "in connection with" clause.

Petitioners argued that because they did not trade stock or owe fiduciary duties to investors who traded stock – controlling facts that were never in dispute – the publications did not meet the "in connection with" requirement under Section 10(b). They also argued that the First Amendment forbade the suit because if the statute were construed to reach pure speech, respondent neither could produce the clear and convincing evidence of "reckless disregard" for the truth required by the "actual malice" rules of *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964), nor could secure injunctive relief in light of *Near v. Minnesota*, 283 U.S. 697 (1931).

Petitioners submitted expert testimony from two witnesses who placed the publications in constitutional context. Among other things, the former SEC deputy chief economist testified that information tying approval of the agreement to the summit may have been material but was true, whereas the May 22nd date turned out to be premature but was not material. A journalism professor from Northwestern University saw the provocative, hyperbolic writing characteristic of investment newsletters as a source of their popularity with readers looking for strong opinions colorfully expressed.

Respondent opposed First Amendment protections and in its closing argument claimed the right to prosecute speakers and publishers ranging from *The Wall Street Journal* to university presidents even if they do not trade securities or carry fiduciary duties. When the district court asked, "You would have no problem in suing *The Wall Street Journal* for fraud if, in fact, if there were a column published that said something fraudulent," respondent replied, "We're not barred from suing them now" and later stated:

> The president of a university is giving a speech about a particular stock. ... He doesn't have any holding in the stock. He says the stock is going to pop ... go out and buy it. Is he going to be subject to the securities laws? He may well be if all the elements are met, particularly if the SEC can prove that he knew there

> was no reasonable basis that the stock was [going to pop].

3. The district court held that respondent could state a claim against petitioners under Section 10(b) consistent with the First Amendment. The court believed that petitioners' statements in both the Report and the E-mail amounted to commercial speech entitled to no heightened First Amendment protections. Further, in the court's view, the speech was analogous to a corporation's communications to its own investors to whom it owed fiduciary duties, which was held to satisfy the "in connection with" requirement in *SEC v. Texas Gulf Sulphur*, 401 F.2d 833, 857-58, 860 (2d Cir. 1968). Disregarding the obvious incentives Stansberry had to publish the truth and Wingfield had to please respondent, the court imposed liability, set civil fines of $240,000, disgorged profits, and ordered injunctive relief that simply tracks the language of Rule 10b-5(a) and (b) in prohibiting petitioners from

> violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 ... and Rule 10b-5 ... by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security ... [t]o employ any device, scheme, or artifice to defraud; or ... [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the

> light of the circumstances under which they were made, not misleading.

App. 115-16a.

4. On petitioners' appeal, the Fourth Circuit affirmed. It found that Rule 10b-5's "in connection with" clause was satisfied on the theory that petitioners' readers traded in USEC shares and that this trading was required for the "reputational gain" the panel contended that petitioners needed to "maximize" sales of the Report. The court also held that petitioners intended to induce securities transactions and that they published the Report to readers who were likely to rely on it. Although the Fourth Circuit's construction of Section 10(b) required the statute's application to pure expression, the court held the First Amendment had no role to play in the case because the First Amendment does not protect fraudulent speech. The court ruled that respondent was not required to satisfy the heightened evidentiary burdens of *New York Times*. Further, the Fourth Circuit declined to review the entire record *de novo* pursuant to *Bose v. Consumers Union of U.S.*, 466 U.S. 485 (1984). For the same reasons it rejected application of the actual malice rules of *New York Times* and independent appellate review under *Bose*, the Fourth Circuit found no constitutional infirmity with the district court's permanent injunction. It stayed its mandate pending certiorari, however, to enable this Court to consider the "substantial" questions, *see* Fed. R. App. P. 41(d)(2)(A), presented in this case.

5. Also in 2002, the Maryland Securities Commissioner issued subpoenas to petitioners for subscriber information pursuant to an investigation of the E-mail and the Report under the antifraud and registration provisions of the state securities laws. The state's highest court, the Maryland Court of Appeals, agreed with petitioners that a heightened standard applied, holding that the "protective umbrella of the First Amendment" prevented enforcement of the subpoenas absent a compelling need for the information, which the state could not supply. *Lubin v. Agora, Inc.*, 882 A.2d 833, 846 (Md. 2005) (App. 143a). The court rejected the Commissioner's arguments that "First Amendment rights are not implicated" by the case and that petitioners' publications were only "commercial expression directed solely to [petitioners'] economic interest" and were unprotected because they were misleading. After the court held that the First Amendment applied to petitioners' speech activity, the Commissioner brought no further proceedings.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted to review the Fourth Circuit's significant expansion of the application of Section 10(b) of the Securities Exchange Act of 1934, which was held for the first time in this case to reach mere impersonal investment advice. That ruling conflicts with this Court's precedents applying the statute's "in connection with" requirement, as well as with the established body of lower court precedent that had previously given rise to a settled understanding among publishers regarding Section 10(b)'s cabined scope. As one analysis of the ruling

stated, "The Fourth Circuit's decision ... reads existing precedent as broadly as possible in interpreting Section 10(b)'s 'in connection with' requirement. ... Thus, *all speakers*, from pundits commenting on corporate developments to advertising copyrighters, *must be wary*."[2] This case has thus been closely watched because of the radical departure it represents, as *The New York Times* recognized: "If the suit is successful, it will be the first to use the securities laws against commentary about a company in which the authors had no financial stake." Adam Liptak, *E-mail Stock Tip Tests Limits of Securities Laws*, N.Y. TIMES, Aug. 3, 2003, at 10.

Certiorari is also warranted because the ruling below conflicts with the precedents of this Court and other circuits holding that speech such as the expression at issue in this case is protected by the First Amendment. In particular, review is warranted of the Fourth Circuit's holdings that the government was not required to prove its case through clear and convincing evidence that petitioners spoke with reckless disregard for the truth; that the court of appeals need not review the trial evidence *de novo*; and that the Constitution permits the entry of an injunction enforceable upon pain of contempt that broadly forbids petitioners in the future from engaging in any speech that violates the court's

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[2] DECHERT LLP, SEC V. PIRATE INVESTOR LLC: EXPANSION OF THE 'IN CONNECTION WITH' REQUIREMENT UNDER EXCHANGE ACT SECTION 10(B) (Jan. 2010), available at http://www.dechert.com/library/White_Collar-FS-SA-01-10-SEC_v_Pirate_Investor_LLC.pdf (emphasis added).

sweeping reading of Section 10(b). At the very least, those significant constitutional concerns counsel in favor of reading the statute narrowly.

I. This Court Should Review The Fourth Circuit's Holding That The Antifraud Provisions Of Section 10(b) Apply To Impersonal Investment Advice By A Party That Does Not Trade In A Stock And Owes No Applicable Fiduciary Duty

Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 forbid any material "untrue statement," as well as "fraud or deceit," "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. In this case, petitioners received the same payment for the Report regardless of whether any reader purchased USEC stock, as respondent conceded at oral argument when agreeing petitioners received *no* benefit from any trading. Dec. 2, 2008 Tr. 50:8-9 ("The defendants' benefit was getting the thousand dollars [from the sale of the Report]."). In holding that petitioners could nonetheless be held liable, the Fourth Circuit became the first court of appeals to reject the single most significant limitation on the scope of 10(b) liability. The court of appeals held that the statute may be violated by speech in the form of impersonal investment advice by a speaker who does not trade in the relevant stock and who owes no applicable fiduciary duty.

This Court has made clear that the phrase "[i]n connection with the purchase or sale of any security" is "limiting language." *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 38 (1977). But the Fourth Circuit has

used it for the opposite purpose – to adopt a legal rule of unlimited application empowering respondent and private plaintiffs to engage in endless second-guessing of editorial judgments made by publishers and market commentators.

The Fourth Circuit's ruling thus undoes decades of precedent laying down predictable boundaries in securities regulation and for the first time under Section 10(b) exposes pure speech about stocks and public companies to enforcement actions by respondent and to suits for damages by private litigants. The lack of any limiting principle in the Fourth Circuit's ruling makes it applicable not only to impersonal investment advice but to any type of disinterested expression, from newspaper reporting to market commentary on television to streaming financial data on the Internet. All of this speech, like petitioners', is expression conveyed without a fiduciary duty by those who do not trade securities.

Until the decision below, courts had uniformly found the "in connection with" requirement to be satisfied only with respect to statements by parties who participate in securities transactions or who breach duties they owe to investors who participate in such transactions. Every time this Court has reached the "in connection with" requirement, the defendant has engaged in this type of conduct. *See Sup't of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 8 (1971) (trading of securities and breach of fiduciary duty); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972) (breach of fiduciary duty); *O'Hagan*, 521 U.S. at 647, 656 (trading of securities and breach of fiduciary duty); *The Wharf*

(Holdings) Ltd. v. United Int'l Holdings, 532 U.S. 588, 596 (2001) (trading of securities); *Zandford*, 535 U.S. at 823 (breach of fiduciary duty).

The only issue under the "in connection with" clause that has previously been the subject of dispute is whether the nexus between a defendant's allegedly deceptive conduct and his trading or breach of duty is sufficiently close to satisfy the statute. Thus, in *O'Hagan*, this Court held that to meet the "in connection with" requirement fraud must "coincide" with or be "consummated" by the purchase or sale of a security. 521 U.S. at 656. The Court further elaborated in *Zandford*, where it found the "in connection with" requirement was established because the fraudulent acts and securities transactions of a "broker who has a fiduciary duty" to clients "were not independent events" as "each sale was made to further [a] fraudulent scheme" that "coincided with" and "require[d] the sale of securities." 535 U.S. at 820-21, 823.

This Court has accordingly planted Section 10(b) in the world of fiduciary duty and securities trading by the defendant. *See O'Hagan*, 521 U.S. at 656 (finding the "in connection with" requirement satisfied because "the *fiduciary*'s fraud is consummated, not when the *fiduciary* gains the confidential information, but when, without disclosure to his principal, he uses the information to *purchase or sell* securities. The *securities transaction* and the *breach of duty* thus *coincide*" (emphasis added)); *Zandford*, 535 U.S. at 825 (summarizing the Court's "in connection with" cases going back to *Bankers Life* as each involving

"fraudulent scheme[s] in which the *securities transactions* and *breaches of fiduciary* duty coincide" (emphasis added)).

Respondent's claims are exactly the type of garden-variety allegation of commercial fraud this Court has always kept out of Section 10(b) to ensure that the statute "does not incorporate common-law fraud into federal law" as such claims are "already governed by functioning and effective state-law guarantees." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162, 171 (2008). The "fraud" of which petitioners are accused – publishing false information about USEC – is a common-law fraud that (assuming it occurred at all) was "consummated" or "complete" when readers bought the Report, *O'Hagan*, 521 U.S. at 656, and thus does not satisfy the "in connection with" requirement. No "subsequent securities transaction" by any reader was necessary to carry out the alleged fraud. *Id.* at 657.

The Fourth Circuit remade the *O'Hagan*/*Zandford* standard from one in which securities trading is "required" for an alleged fraud into one that considers whether it "maximizes" an alleged fraud. App. 29a, 48a. Under the decision below, the "in connection with" requirement can be satisfied by publishers regardless of a lack of fiduciary duty or a financial interest in stocks if they realize "reputational gain" when readers rely on them to make investment decisions. No other court has ever held that "reputational gain" by writers converts their work into a subject for regulation – under a statute that provides no First Amendment

protections, no less – just as no other court has ever held that the *O'Hagan/Zandford* test is met by a speaker who neither trades stocks nor carries fiduciary duties.

The ruling below similarly conflicts with the Court's repeated efforts, most recently in *Stoneridge*, to prevent the wholesale federalization of common-law fraud through Section 10(b). *See* 552 U.S. at 161 (drawing a distinction between the regulated world of "the securities markets – the realm of financing business" and "the realm of ordinary business operations" not governed by Section 10(b)). In cases such as *Santa Fe Indus. v. Green*, 430 U.S. 462, 478 (1977), and *Dirks v. SEC*, 463 U.S. 646, 664 (1983), the Court has rejected theories of liability that, like the approach of the Fourth Circuit below, are not "easily contained" and have "no limiting principle."

Prior to the decision below, it was rare that such a Section 10(b) claim would even be brought, given the force of the courts' consistent narrowing construction. But when it was, courts uniformly rejected it. *See Hart v. Internet Wire*, No. 01-9259, 2002 U.S. App. LEXIS 21310, *5 (2d Cir. Oct. 10, 2002) ("Plaintiffs allege a kind of deception by Bloomberg that is separated from the statutory mooring of § 10(b)."); *SEC v. Wall St. Publ'g Inst.*, 664 F. Supp. 554, 555-56 (D.D.C. 1986) (publisher had no duty to "speak the full truth" under Section 10(b)), *rev'd on other grounds*, 851 F.2d 365 (D.C. Cir. 1988); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1353 (S.D.N.Y. 1977) (magazine and author "simply do not fall into any of the categories of non-privity parties

who have been held liable to defrauded purchasers and sellers under Rule 10b-5").

In sum, review is warranted because the opinion below turns the securities laws into a trap whose trigger, for a publisher, is the offense of successfully cultivating loyal readers. Securities transactions by a defendant or a speaker's duty to the market have for nearly eight decades been a principled and practical way to contain the scope of the statute. The Fourth Circuit has abolished these statutory limitations.

II. The Application Of Section 10(b) To Pure Expression Without Any Constitutional Protections Conflicts With This Court's First Amendment Precedents And The Ruling Of The Maryland Court Of Appeals In A Companion Case Based On The Identical Facts

The Fourth Circuit in this case held that petitioners' speech receives no First Amendment protections or constitutional defenses. It shut the constitutional door in a single sentence: "[T]he First Amendment does not shield fraud." App. 49a (citing *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003)).

The Fourth Circuit's rejection of First Amendment protections conflicts with the unanimous Maryland Court of Appeals in *Lubin*, where the state high court, on the identical facts, held that "[t]he First Amendment is implicated ... when regulations deter or interfere with the receipt of information and free flow of ideas." App. 136a. Had the Maryland

Court of Appeals instead applied the reasoning later adopted by the ruling below, it would have concluded that petitioners' speech received no constitutional protection and compelled enforcement of the subpoenas.

Ignoring the ruling of the Maryland court in this companion case, and straining to uphold liability against the "flippant" language of a newsletter genre and a writer it clearly disdained, App. 7a n.5, the Fourth Circuit swallowed the bait offered by respondent: that because petitioners have been accused of fraud, and because fraud may be punished, the Constitution is completely inapplicable to this case.

That bald position conflicts with this Court's application of the First Amendment to strike down the prior restraints on fraudulent speech in *Schneider v. State*, 308 U.S. 147 (1939), *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). The decision below is also at odds with *Telemarketing Assocs.*, 538 U.S. at 612, where this Court considered "the First Amendment's application to individual fraud actions."

The discussion in *Telemarketing* begins with a statement of the Constitution's affirmative role in the case: "The First Amendment protects the right to engage in charitable solicitation." *Id.* at 611. This Court held that regulation of fraud, though a category of speech that can be punished, must be

"responsive to First Amendment concerns." *Id.* at 621. Hearing the case at the motion to dismiss stage, the Court identified subsequent protections that would address these concerns: clear and convincing evidence at trial and independent *de novo* review on appeal. Citing *New York Times* and *Bose*, this Court stated, "Exacting proof requirements of this order, in other contexts, have been held to provide sufficient breathing room" for speech interests. *Id.* at 620. The Solicitor General, as *amicus curiae*, expressed similar sentiments. *See* Brief of United States and Federal Trade Commission as *Amici Curiae* Supporting Petitioner at 13-14, *Telemarketing Assocs.*, 538 U.S. 600 (No. 01-1806).

The fact that fraud is a category of speech that can be punished did *not* render the First Amendment categorically inapplicable in *Schneider*, *Schaumburg*, *Munson*, *Riley*, or *Telemarketing*. The Fourth Circuit therefore approached the issue backwards. The question is not whether specific fraudulent speech is protected. Fraud – like libel or obscenity – is actionable. But pursuing speech as "libelous," "obscene" or "fraudulent" does not end the constitutional inquiry, it only begins it.

The correct starting point in any First Amendment analysis is thus the nature of the speech at issue. This case concerns the publication of disinterested investment advice, a type of speech which is fully shielded by the Constitution. *See Lowe v. SEC*, 472 U.S. 181, 208, 210 n.58 (1985) (construing the Investment Advisers Act of 1940 narrowly to cover only "those who provide personalized advice attuned to a client's concerns").

The question is what protections the First Amendment requires when government challenges the truth of this expression. The Fourth Circuit answered with none at all, a ruling that violates three lines of this Court's jurisprudence. Imposition of damages for alleged falsity in the Report and E-mail without application of the actual malice rules is in conflict with *New York Times* and its progeny; denial of independent appellate review is in conflict with *Bose*; and issuance of a permanent injunction barring future false speech is in conflict with *Near*.

a. The imposition of monetary fines on petitioners' speech in the absence of actual malice protections and independent appellate review is in conflict with the decisions of this Court and the circuit courts

The Fourth Circuit's decision is a direct assault on the constitutional protections created under *New York Times* and *Bose* and warrants certiorari for two separate reasons. First, the opinion conflicts with the precedents of this Court and numerous federal and state courts mandating actual malice requirements and independent appellate review outside of the libel context whenever pure speech on matters of public concern is challenged as false, regardless of the asserted cause of action. Under the destabilizing decision below, speech which would otherwise be covered by these heightened evidentiary and appellate rules has been stripped of protection because the alleged falsity arises under a securities law. Second, the decision jeopardizes the Court's core jurisprudence in the libel and non-libel areas alike by empowering respondent and private plaintiffs to

evade these established constitutional protections through the vehicle of Section 10(b) litigation. A body of law under the First Amendment and a body of law under Section 10(b) applying different standards to the same content cannot co-exist.

Under *New York Times*, speech is protected unless a defendant has knowledge of falsity or "entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Under Section 10(b), scienter is established if the defendant acted "intentionally or recklessly" in making a false statement. While the *New York Times* standard requires clear and convincing proof, Section 10(b) only requires preponderance of the evidence. Cases tried under the *New York Times* standard receive on appeal a searching, "independent examination" of the "entire record" under *Bose* to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." 466 U.S. at 499. Scienter determinations under Section 10(b) are reviewed only for clear error.

The *New York Times* standards arose under libel law, but this Court has now applied them to false light (*Time v. Hill*, 385 U.S. 374, 387-88 (1967)); product disparagement (*Bose*, 466 U.S. at 491); and intentional infliction of emotional distress (*Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988)). In the circuit courts, heightened First Amendment requirements have been applied to breach of contract (*Compuware Corp. v. Moody's Investors Servs.*, 499 F.3d 520, 531 (6th Cir. 2007)); right of publicity (*Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180,

1186 (9th Cir. 2001)); intentional interference with contractual and prospective business relations (*Jefferson County Sch. Dist. No. R-I v. Moody's Inc.*, 175 F.3d 848, 856-58 (10th Cir. 1999)); trespass and breach of loyalty (*Food Lion Inc. v. Capital Cities/ABC Inc.*, 194 F.3d 505, 524 (4th Cir. 1999)); and tortious interference (*Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) and *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990)).

While the Fourth Circuit's ruling broadly conflicts with all of this authority, two of these cases specifically involved speech about securities. In *Jefferson County*, the Tenth Circuit, relying on *Hustler*, held that a rating of a school district's bonds could not serve as the basis for claims for intentional interference with contractual and prospective business relations unless it contained statements provably false under First Amendment standards. 175 F.3d at 857-58. In *Compuware*, the Sixth Circuit applied actual malice protections to reports on a public corporation by a financial ratings company. Actual malice was required because the claim against defendant Moody's for breach of contract (the plaintiff also brought a defamation claim) was "dependent on the truth of the rating and the care taken by the publisher during the publication process" and was "intimately tied to speech, expression, and publication." 499 F.3d at 530-31. The issues in petitioners' case are identical – the "truth" of a publication on a public company read by the investing public and the "care taken by the

publisher" – and yet actual malice protections were denied to them. The Sixth Circuit noted the importance of the heightened clear and convincing evidence requirement in affirming summary judgment. *Id.* at 526. But had these same claims been brought pursuant to Section 10(b), under the Fourth Circuit's ruling, no constitutional defenses would apply.

The Fourth Circuit's ruling is also inconsistent with decisions of courts that have utilized First Amendment analysis in dismissing fraud and negligent misrepresentation cases against publishers of disinterested financial information. In *First Equity Corp. v. Standard & Poor's*, 690 F. Supp. 256, 258-59 (S.D.N.Y. 1989) (Mukasey, J.), *aff'd on other grounds*, 869 F.2d 175 (2d Cir. 1989), the court held that "well-established First Amendment principles" required plaintiffs asserting that a publication on corporate bonds constituted common-law fraud "to demonstrate actual malice when seeking to impose liability ... for publication of a non-defamatory misstatement." Similarly, misrepresentation claims by investors have been rejected due to the absence of heightened constitutional protections in the tort. *See Daniel v. Dow Jones*, 137 Misc. 2d 94, 102 (N.Y. Cty. Spec. Term 1987) ("News services ... or more expensive, specialized media ... are instruments for the free flow of all forms of information, and should be treated as unquestionably within the First Amendment's guarantee of freedom of the press."); *Gutter v. Dow Jones*, 490 N.E.2d 898, 901-02 (Ohio 1986) (citing *Bose* in finding that "important First Amendment interests" and "constitutional

constraints" applied because a "contrary result" would have a "staggering deterrent effect on potential purveyors of printed material").

Review of the ruling below is necessary and warranted because the Fourth Circuit's decision will destabilize the substantial body of law already existing under *New York Times* and *Bose* protecting the public's interest in receiving information. The Fourth Circuit has removed from the protective shield of the First Amendment any disinterested expression concerning securities or a public company that might be challenged as false under Section 10(b). The range of potential overlap between speech that is covered by causes of action to which actual malice requirements attach and speech that would now be subject to Section 10(b) without such protections is difficult to overstate.

Under the Fourth Circuit's decision, for example, issuers of stock can now attack speech they see as false or unflattering using Section 10(b), thus avoiding the higher strictures of actual malice and independent appellate review that govern the law of libel and the non-defamation causes of action in which actual malice is required. While respondent in this case objected to speech that reflected positively on a company's prospects, it too will be able to use the securities laws to sue over critical coverage of companies that would otherwise be entitled to *New York Times* and *Bose* protections. The end-run around the First Amendment would include damage actions by individual investors against publishers if they allege they lost money in the markets because a company executive was misquoted or potential

corporate developments misconstrued. The jurisprudence setting heightened evidentiary protections for speech on matters of public concern that the federal and state courts have carefully built since the constitutional revolution of *New York Times* is at risk.

Under *Bose*, the full record does not support any inferences, let alone with the clear and convincing proof required by *New York Times*, that Stansberry knowingly falsified information to his readers. The record indisputably shows that he believed – and still does – that he accurately reflected his interview with Wingfield, having sent to him the very next day copies of the E-mail, the Report, and the Memorandum that fully disclosed his interpretation of their conversation. By ignoring the evidence of Stansberry's state of mind at the time of publication and the testimony of the two expert witnesses, the district court and the court of appeals made the mistake of presuming material falsity and fraudulent intent based only on a style of writing that offended them and the $1,000 cost of the Report.

Confronted with authority showing that liability under the actual malice requirement is not established on an evidentiary reed as thin as a difference in recollection between a reporter and a source over an interview, the Fourth Circuit conceded that higher proof requirements might well have changed the outcome in this case. App. 20-21a n.14. It found liability under Section 10(b) simply because Stansberry, having interviewed Wingfield, "was in a position to know" whether the statements he published "were true." App. 20a. That standard has

been rejected under the First Amendment because it leaves no room for the "breathing space" for speech freedoms embodied by *New York Times* and *Bose*, where this Court noted the "significant difference between proof of actual malice and mere proof of falsity" and held that an author's "misconception" about "what [he] heard" cannot support an inference, by clear and convincing proof, that he "realized the inaccuracy at the time of publication." *Bose*, 466 U.S. at 511-13; *see also St. Amant*, 390 U.S. at 733 (defendant's "mistake ... does not evidence doubtful mind on his part").

As this case foreshadows, vast amounts of pure speech will be actionable under the securities laws if the future lawsuits the Fourth Circuit has authorized are permitted to turn on the lesser evidentiary standards it has embraced.

b. The permanent injunction warrants this Court's immediate intervention because it violates the *Near* doctrine and will cause irreparable harm

The district court in this case imposed, and the Fourth Circuit expressly approved, a broad injunction that simply repeats the language of Rule 10b-5(a) and (b) in prohibiting petitioners from making "any untrue statement of a material fact" under a securities statute which has been construed to reach pure expression. In a single sentence, the Fourth Circuit dismissively reasoned: "The injunction does not constitute an unlawful prior restraint because it only enjoins [petitioners] from engaging in securities

fraud, which we have held is unprotected speech." App. 50a.

The ruling below disregards nearly 80 years of unbroken jurisprudence, beginning with *Near*, in which this Court has struck down broad prior restraints on the publication of false speech in the future as "the essence of censorship." 283 U.S. at 713. As Chief Justice Burger wrote surveying the *Near* doctrine: "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. ... If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The irreparable harm to petitioners from the injunction, *see Elrod v. Burns*, 427 U.S. 347, 373 (1976), and the indications that respondent has every intention of seeking out expression it dislikes in the future, make certiorari appropriate now.

"For many years it has been clearly established that 'any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity.'" *CBS v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers). "[P]ermanent injunctions" such as the final order placing petitioners under the perpetual threat of contempt from government attack on its publications "are classic examples of prior restraints" impermissible under the First Amendment. *Alexander v. United States*, 509 U.S. 544, 550 (1993). As Chief Justice Rehnquist stated in *Alexander*, this

Court's "understanding of what constitutes a prior restraint" comes from cases such as *Near*, where the Court invalidated an order enjoining a defendant who had published newspapers found to constitute "malicious, scandalous, or defamatory" material under a state nuisance law from publishing any such additional publications in the future. The order was unconstitutional, the Chief Justice explained, because instead of punishing *past* speech it "involved a true restraint on *future* speech." 509 U.S. at 550 (emphasis added).

The permanent injunction in this case is a plain violation of *Near*. Petitioners have not been enjoined from republishing a specific statement that a court has already found unprotected. *See Kingsley Books v. Brown*, 354 U.S. 436, 445 (1957). Nor have they been enjoined from continuing an ongoing commercial advertising practice. *See Pittsburgh Press v. Pittsburgh Comm'n on Human Rel.*, 413 U.S. 376, 388-90 (1973). Rather, they have been broadly barred across the board from publishing any new statements that a court may one day decide are in violation of Section 10(b) and not a protected form of speech.

As in *Near*, this case involves an injunction issued after a full merits proceeding. As in *Near*, where a previous publication held to violate a statute could not justify a prior restraint on future publications, so is the finding that petitioners published a statement in violation of Section 10(b) in the past constitutionally insufficient to support an injunction against speech yet to come that a court

might hold to violate the statute. This Court has explained why:

> [T]he state [has] made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain."

Vance v. Universal Amusement Co., 445 U.S. 308, 311 n.3 (1980) (holding as an impermissible prior restraint orders enjoining theater-owners who had shown obscene movies from exhibiting films in the future that had not yet been determined to be obscene) (citation omitted). Further revealing the seriousness with which it views broad restrictions on future speech, the Court in *Vance* asserted, "[T]he presumption against prior restraints is heavier . . . than that against limits on expression imposed by criminal penalties." *Id.* at 316 n.13.

In its brief in *Lowe*, respondent, in an effort to save the prior restraint in *that* case, all but conceded why the prior restraint in *this* case is unconstitutional. "[T]he principal objection to prior restraints – that speech will be suppressed before it can be ascertained with relative certainty that it is unprotected by the First Amendment – is wholly inapplicable to the professional licensing context," respondent stated. Brief for Securities and Exchange Comm'n at 46-47, *Lowe*, 472 U.S. 181 (No. 83-1911).

But the "principal objection to prior restraints" – as articulated by the Solicitor General – describes *exactly* the constitutional harm at the heart of this case. *See Pittsburgh Press*, 413 U.S. at 390 ("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.").

Petitioners have no way to "ascertain" whether their future speech will be punished or protected retrospectively. The federal courts have broadly enjoined them from making "any untrue statement" under a statute which, in the interpretation of the federal courts, affords no heightened evidentiary protections for pure speech. The state courts in *Lubin*, on the other hand, on the identical facts, have held that the First Amendment applies to their speech.

Subjecting petitioners, who are not in the securities business, have no fiduciary duties to investors, and do not trade the stocks they write about, to a sweeping federal injunction targeting expression that the state courts have expressly stated triggers First Amendment interests puts them in the impossible position of guessing whether their future speech will be punished or protected and thus forces them to "make only statements which 'steer far wider of the unlawful zone.'" *New York Times*, 376 U.S. at 279 (citation omitted). It is no answer that petitioners can raise First Amendment defenses if and when their future speech is questioned, as the district court contends. App. 109a. The harm of a

prior restraint is the speech it suppresses before any speech is challenged or any contempt proceeding initiated. *See Alexander*, 509 U.S. at 560 (Kennedy, J., dissenting).

That fraud, like defamation or obscenity, is a category of speech that may be penalized does not make injunctions against fraud any more permissible than injunctions against defamation or obscenity. "Frauds," as this Court stated 70 years ago, "may be denounced as offenses and punished *by law*," not by equity. *Schneider*, 308 U.S. at 164 (reversing conviction under ordinance that required canvassers to obtain permits prior to distributing literature) (emphasis added); *see Riley*, 781 U.S. at 803 (Scalia, J., concurring) ("It is axiomatic that, although fraudulent misrepresentation of facts can be regulated, the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable."). Focusing on classes of speech in the prior restraint context as a proxy for whether First Amendment considerations apply is a meaningless and constitutionally-flawed exercise:

> Nor does it help to distinguish situations in which the "speech" involved does not merit first amendment protection from those in which it does merit such protection, the latter alone deserving the benefit of the full-blown presumption against prior restraints. A particular communication cannot authoritatively be called protected or unprotected at a

> point when, by definition, no court has yet determined the constitutional question.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1046-47 (2d ed. 1988).

This Court's precedents show that even in areas of so-called "unprotected" speech where expression can be subject to penalties or other kinds of regulation, broad prior restraints do not survive. *See Telemarketing*, 538 U.S. at 612 (noting that "prophylactic statutes designed to combat fraud by imposing prior restraints" were struck down in *Schaumburg*, *Munson*, and *Riley*); *Vance*, 445 U.S. at 311 (permanent injunction on display of obscene films violates First Amendment); *Near*, 283 U.S. at 713 (permanent injunction on publication of defamatory speech unconstitutional). The presumption against prior restraints is not any less vigorous because the government acts pursuant to an antifraud provision as in this case.

III. At The Very Least, The First Amendment Implications Of The Ruling Below Require Narrowly Reading The "In Connection With" Requirement Of Section 10(b)

In *Lowe*, the only time this Court has construed a securities statute in relation to the speech of a publishing defendant who did not have fiduciary duties or trade stocks, it found that the publisher was not covered, relying on the constitutional avoidance doctrine to reach this result. This Court interpreted language exempting "bona fide" publishers from the

definition of persons covered under the '40 Act as "investment advisers" who must register prior to offering investment advice. In construing the exemption, the Court looked to the history and purpose of the law:

> The legislative history plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice ... On the other hand, Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities.

Lowe, 472 U.S. at 204.

This Court thus recognized that First Amendment precedent "support[ed] a broad reading of the exclusion." *Id.* at 205. A key consideration was the fact that the '40 Act was passed after the decision in *Near*. As explained in *Lowe*, "In *Near*, the Court emphatically stated that the 'chief purpose' of the press guarantee was 'to prevent previous restraints upon publication.'" *Id.* at 204. The *Lowe* Court made clear that Congress was "undoubtedly aware" of *Near* when it passed the '40 Act, *id.*, and would not have intended the statute to violate recently-articulated constitutional norms. Section 10(b) was also enacted in the wake of *Near*, and respondent is attempting, as it did in *Lowe*, to regulate pure speech in violation of *Near*'s rule against prior restraints.

In this case, petitioners argued that the "in connection with" requirement in Section 10(b) is exactly the sort of loose, ambiguous language that must be confined to avoid constitutional concerns. In *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106 (1948), this Court narrowly read a portion of the Federal Corrupt Practices Act concerning the prohibition of expenditures "in connection with" elections in order to prevent regulation of periodicals published by labor unions. In affirming the dismissal of the indictments, the Court wrote: "[Congress] did not want to pass any legislation that would threaten interferences with the privileges of speech or press. ... The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." *Id.* at 120-21.

This Court has thus applied the constitutional avoidance doctrine whether construing a statute to decide what kind of speech activity must be excluded from the law, as in *Lowe*, or what kind cannot be included, as in *CIO*. But the Fourth Circuit ignored *CIO* and misread *Lowe* by creating a meaningless distinction between the "exceptive" language in the '40 Act and the "in connection with" language in Section 10(b). App. 46a. It thus missed the big picture: that this Court construes ambiguity in securities statutes to ensure that they do not violate the First Amendment. *See Morse v. Republican Party of Virginia*, 517 U.S. 186, 245 (1996) (referring to the "narrow[]" reading in *Lowe* as necessary "so as not to impose suspect prior restraints") (Scalia, J., dissenting).

Nothing in the legislative record indicates that Congress intended to apply Section 10(b) to statements made by non-fiduciaries who are not themselves otherwise engaged in securities trading. The legislative history shows that lawmakers were concerned about the speech of publishers only to the extent that they were pretending to give "impartial, disinterested discussion of the stock market" when they were actually financially interested because they were trading stocks or receiving payments from issuers and not disclosing either activity. *See* S. Rep. 792, 73d Cong., 2d Sess. 8 (1934). The securities laws clearly cover these practices, and respondent pursues such cases vigorously today – as it would still be able to do after a reversal of the Fourth Circuit.[3]

The need for this Court's intervention today is even greater than it was in *Lowe*, as Section 10(b), unlike the '40 Act, is not limited to the provision of investment advice. It covers all factual statements about securities and public companies, a much broader category of speech than stock recommendations, and it permits private lawsuits, which the '40 Act does not. With this case, respondent seeks to undo *Lowe* by using a different

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[3] The Fourth Circuit again misreads *Lowe* to suggest that this Court held that publishers exempt from the '40 Act remained for all purposes "subject to the coverage of § 10(b)." App. 46a. The cited footnote from *Lowe* addresses cases involving newspaper and newsletter writers who traded the stocks they recommended by "scalping" or "front running" – purchasing a security prior to publication and selling later at a profit – a course of conduct in which the defendants' own trading coincided with their speech and thus triggered the statute.

and more dangerous regulatory instrument and to regain the editorial control over disinterested investment and financial writing that this Court properly took away from it 25 years ago.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Appendix A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, *Plaintiff-Appellee,* v. PIRATE INVESTOR LLC; FRANK PORTER STANSBERRY, *Defendants-Appellants,* and AGORA, INCORPORATED, Defendant, JAMES DALE DAVIDSON, Intervenor/Defendant.	No. 08-1037

FORBES, LLC; HEARST CORPORATION; TRIBUNE COMPANY (including the Baltimore Sun); EAGLE FINANCIAL, INCORPORATED; INVESTORPLACE MEDIA, LLC; AMERICAN SOCIETY OF NEWSPAPER EDITORS; CALIFORNIA FIRST AMENDMENT COALITION; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS; THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION,

Amici Supporting Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, Senior District Judge. (1:03-cv-01042-MJG)

Argued: December 2, 2008

Decided: September 15, 2009

Before WILLIAMS, Chief Judge,* and NIEMEYER and MOTZ, Circuit Judges.

Affirmed by published per curiam opinion.

ARGUED: Bruce D. Brown, BAKER & HOSTETLER, L.L.P., Washington, D.C., for Appellants. Michael Conley, UNITED STATES SECURITIES & EXCHANGE COMMISSION, Washington, D.C., for Appellee. ON BRIEF: Bruce W. Sanford, Lee T. Ellis, Jr., Laurie A. Babinski, BAKER & HOSTETLER, L.L.P., Washington, D.C.; Matthew J. Turner, Baltimore, Maryland, for Appellants. Brian G. Cartwright, General Counsel, Andrew N. Vollmer, Deputy General Counsel, Jacob H. Stillman, Solicitor, Mark Pennington, Assistant General Counsel, Rada L. Potts, Senior Litigation Counsel, SECURITIES & EXCHANGE COMMISSION, Washington, D.C., for Appellee. Walter Dellinger, Mark S. Davies, Allison Orr Larsen, O'MELVENY & MYERS, L.L.P., Washington, D.C.; Kai Falkenberg, Editorial Counsel, FORBES, L.L.C., New York, New York; Eve Burton, Jonathan Donnellan, THE HEARST CORPORATION, New York, New York;

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* Chief Judge Williams heard oral argument in this case but did not participate in the decision. The decision is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

David S. Bralow, Assistant General Counsel, TRIBUNE COMPANY, East Coast Publishing, New York, New York; Lucy A. Dalglish, Gregg P. Leslie, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Arlington, Virginia; Kevin M. Goldberg, AMERICAN SOCIETY OF NEWSPAPER EDITORS, Arlington, Virginia; Kathleen A. Kirby, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, Washington, D.C.; Robert M. O'Neil, Josh Wheeler, THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, Charlottesville, Virginia, for Amici Supporting Appellants.

OPINION PER CURIAM:

Frank Porter Stansberry and Pirate Investor LLC (collectively, "Appellants") offered and sold an e-mail stock tip. The offer and the tip contained representations that information in both documents was the product of conversations with a senior executive inside the company that was the focus of the tip. After conducting a bench trial, the district court concluded that the representations concerning the source of information in the e-mail stock tip were false, and it determined that Appellants had violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78j(b) (West 2009), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (2008), by offering and selling the stock tip. The district court ordered disgorgement of Appellants' profits from the sales of the stock tip, imposed civil penalties, and issued an injunction against future

violations of Section 10(b) and Rule 10b-5.[1] Appellants argue that the facts of this case do not support the district court's finding of liability, and that the injunction against future violations of § 10(b) is overbroad. For the following reasons, we affirm.

I.

Pirate Investor LLC is a Maryland limited liability company that publishes investment newsletters.[2] Pirate also provides an e-mail service to its subscribers called the "Blast." Pirate is wholly owned by Agora, Inc., a Maryland corporation that publishes books, magazines, and newsletters covering a wide range of topics.[3] Stansberry is the editor-in-chief of Pirate, and in this capacity he writes and publishes investment newsletters.

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[1] "The scope of Rule 10b-5 is coextensive with the coverage of § 10(b)." *SEC v. Zandford*, 535 U.S. 813, 816 n. 1 (2002). Accordingly, we will use "§ 10(b)" to refer to both the statute and the rule. *See SEC v. Wolfson*, 539 F.3d 1249, 1256 n.11 (10th Cir. 2008).

[2] We view the facts in the light most favorable to the prevailing party below, in this case the SEC. *See Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 590 (2001); *Taylor v. First Union Corp.*, 857 F.2d 240, 245 (4th Cir. 1988).

[3] Along with Stansberry and Pirate, Agora was an original defendant in the SEC's action. The district court rejected the SEC's theory that Agora, as the parent company of Pirate, was also liable for any wrongdoing committed by Stansberry and Pirate, and the SEC has not appealed that ruling.

Sometime in April 2002, Stansberry became aware of a company called USEC, Inc. USEC is a provider of uranium-enrichment services that began as an arm of the United States government.[4] The company currently is the executive agent of the United States government under a disarmament pact that was signed between the United States and Russia in 1993. Under the pact, known as "Megatons to Megawatts," Russia sells uranium that was formerly used in Soviet nuclear warheads to the United States for use as fuel in nuclear power plants. The pact further requires USEC and OAO Techsnabexport ("Tenex"), its Russian counterpart, to periodically renegotiate the price of the uranium. Any new pricing agreement is subject to approval by both the United States and Russian governments. The pricing agreement between USEC and Tenex expired at the end of 2001, and the two companies negotiated a new agreement in February of 2002. Neither the Russian nor the United States governments had approved this new agreement as of May 2002, however, and USEC requested that the United States government place the pricing agreement on the agenda for a summit between President George W. Bush and Russian President Vladimir Putin that was planned for that month.

After becoming aware of the circumstances surrounding USEC's pricing agreement, Stansberry contacted Steven Wingfield, USEC's Director of Investor Relations, and on May 2, 2002, conducted a

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[4] USEC was privatized in July of 1998.

telephone interview with Wingfield. This case revolves around two communications — a special report on USEC ("USEC Special Report") and a solicitation hawking that report ("Super Insider Tip E-mail") — that Stansberry prepared following that telephone conversation.

The Super Insider Tip E-mail was a promotional document calling on investors to "DOUBLE YOUR MONEY ON MAY 22ND WITH THIS 'SUPER INSIDER' TIP." (J.A. at 2972.) Specifically, the document purported to contain information obtained from "a senior company executive" that would allow investors to know exactly when "a major international agreement between the United States and Russia" would be concluded, resulting in substantial profits for a particular U.S. company. (J.A. at 2972.) The document identified May 22 as the day the deal would close and inveigled investors with assurances that "[t]his is the kind of insider information that could make you a lot of money." (J.A. at 2972-73.)

The Super Insider Tip E-mail also included some back-ground on the company, as well as details of how the upcoming deal would benefit the company.[5]

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[5] The e-mail also contained several flippant remarks. The e-mail's commentary on the nature of politics is particularly noteworthy:

> See how this works? It's a total insider deal. Money and favors in exchange for a fat deal with the Russians. Hey, I know it's dirty. But I don't make the rules and I don't run the company or

The document did not provide the name of the company. For that nugget of information, investors were told that they would have to pay $1,000. Stansberry signed the e-mail under the pseudonym "Jay McDaniel."[6]

Those who responded to the Super Insider Tip E-mail and paid $1,000 would receive the USEC Special Report. This communication identified USEC as the company referenced in the Super Insider Tip E-mail. The USEC Special Report engaged in a financial analysis of USEC's fundamentals and discussed its

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> involve myself in politics. On the other hand, I see nothing wrong with profiting from my insider knowledge of this deal and I don't think you should be ashamed to do so either.
>
> And guess what? The deal with the Russians has ALREADY BEEN SIGNED. That's right. It's all done, locked up. Finished. The only thing that both sides are waiting on is the proper media event to announce this commercial cooperation between the Ruskies and us. It's a feel good thing. It's PR for the politicians. You know how the game works.

(J.A. at 2974-75.) Despite the tip's suggestion that the author was also profiting from the information, "[a]t no time relevant to this case did Stansberry, Pirate Investor, or Agora own or trade in the stock of USEC." (J.A. at 124.)

[6] In fact, "Jay McDaniel" was the pen name of Raymond Madron, an independent contractor for Pirate who wrote a weekly promotional piece advertising Agora products or services.

role as the United States' agent under the 1993 disarmament pact. It observed that USEC had reached an agreement with its Russian partner regarding a market-based pricing agreement for nuclear fuel, but cautioned that "implementation of the agreement is subject to review and approval by the U.S. and Russian governments." (J.A. at 3111.) The USEC Special Report then repeated the claim made in the Super Insider Tip E-mail that: "A USEC senior executive has assured me that the new Russian agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said 'watch the stock on May 22nd.'" (J.A. at 3111.)

On May 13, 2002, Stansberry sent the Super Insider Tip E-mail to the Pirate Investor Blast Database, a list of e-mail addresses of subscribers to Pirate products. After an initial favorable response,[7] Stansberry caused the Super Insider Tip E-mail to be sent to numerous other electronic databases associated with Agora products, as well as at least one database that had no affiliation with Agora. Ultimately, over 800,000 individuals received the Super Insider Tip E-mail. Investors purchased 1,217 copies of the USEC Special Report, resulting in net proceeds of $1,005,000. Pirate received $626,500 of that sum.

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[7] One hundred seven USEC Special Reports were sold in the initial 24 hours after submission of the Super Insider Tip E-mail to the Pirate Investor Blast database.

Of course, what investors did not know, and what became the focus of the SEC's case against Stansberry and Pirate, was that Wingfield had never told Stansberry that approval of the USEC-Tenex pricing agreement would be announced on May 22.[8] Indeed, nothing was announced on May 22, and the pricing agreement was ultimately announced on June 19, 2002. On April 18, 2003, the United States Securities and Exchange Commission ("SEC") filed a civil complaint charging Agora, Pirate, and Stansberry with securities fraud under § 10(b) of the Securities Exchange Act of 1934. Following a bench trial, the district court concluded that Appellants violated § 10(b) by falsely claiming that a company insider provided the information in the Super Insider Tip E-mail and the USEC Special Report. Appellants were held jointly and severally liable for disgorgement of the profits of the scheme, plus prejudgment interest. Civil penalties were also imposed on Appellants, and the district court entered a permanent injunction enjoining them from further violations of § 10(b).[9] Appellants timely appealed, raising three issues: (1) whether the conduct in this case constituted a violation of § 10(b); (2) whether, if

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[8] In the proceedings before the district court, Stansberry adhered to his claim that Wingfield did, in fact, suggest that approval of the pricing agreement would be announced on May 22. The district court found, however, that Wingfield made no such statements. Stansberry and Pirate do not challenge this particular factual finding on appeal.

[9] By order dated February 28, 2008, a panel of this court stayed the injunction pending appeal.

the conduct here does fall within the purview of § 10(b), the First Amendment entitles Appellants to the heightened protections it affords the media in other contexts; and (3) whether the permanent injunction entered by the district court is an improper prior restraint on speech.

II.

We begin with Appellants' claim that their conduct did not constitute a violation of § 10(b). In a civil enforcement action under § 10(b), the SEC must establish that the defendant "(1) made a false statement or omission (2) of material fact (3) with scienter (4) in connection with the purchase or sale of securities."[10] *McConville v. SEC,* 465 F.3d 780, 786 (7th Cir. 2006). The SEC bears the burden of establishing each element by a preponderance of the evidence. *Herman & MacLean v. Huddleston,* 459 U.S. 375, 387-91 (1983) (preponderance of the evidence standard applies to § 10(b) actions). We address each element in turn.

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[10] Unlike private litigants, the SEC need not prove the additional elements of reliance or loss causation. *See SEC v. Rana Research, Inc.,* 8 F.3d 1358, 1364 (9th Cir. 1993) ("The SEC need not prove reliance in its action for injunctive relief on the basis of violations of section 10(b) and Rule 10b-5."); *SEC v. Blavin,* 760 F.2d 706, 711 (6th Cir. 1985) ("Unlike private litigants seeking damages, the Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money.").

A.

Section 10(b) requires that a defendant act deceptively in order to fall within the coverage of the statute. *Santa Fe Indus., Inc. v. Green,* 430 U.S. 462, 473 (1977) ("The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception."). Deceptive acts include misstatements, omissions by those with a duty to disclose, manipulative trading practices, and deceptive courses of conduct. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,* 128 S. Ct. 761, 769 (2008). The facts of this case easily satisfy this element. The district court found that Wingfield never told Stansberry that approval of the pricing agreement would be announced on May 22, and the Appellants do not challenge that finding on appeal. Thus, Appellants' representations that they based their predictions on information obtained from a source within USEC were misstatements of fact.[11]

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[11] On this point, we believe that the concerns raised by the *amici* are entirely illusory. The *amici* suggest that the district court premised its finding of liability on Appellants' claim that USEC's stock price would rise on a particular day — May 22 — and that such a prediction about a stock price change "is not an 'actual fact' but an 'opinion' that can never be a 'false' statement for purposes of the securities laws." (Amici Br. at 20.) This argument ignores the plain language of the district court's opinion, which clearly shows that the district court based its liability determination, not on the prediction itself, but on Appellants' claims that the prediction was the result of a conversation with a company insider:

B.

It is not enough, however, for the SEC to point to a false statement — the misrepresentation must concern a material fact. *See Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) ("It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant."); *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 656 (4th Cir. 2004) ("The plain language of Rule 10b-5 . . . requires any successful securities-fraud suit to allege a fact that is both untrue *and* material."). We have adopted the following standard for addressing materiality:

> [A] fact stated or omitted is material if there is a substantial likelihood that a reasonable purchaser or seller of a

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> The Court finds that the SEC has established that the Super Insider Solicitation and the Special Report include actionable false statements — to the effect that the author was basing his statement as to a May 22, 2002 rise in stock price upon statements made to him by a senior executive of USEC in a position to know when the price agreement would be approved.

(J.A. at 158.) Claims regarding the source of information are not expressions of subjective opinion, but are representations of an objectively verifiable fact. *Cf. Miller v. Asensio & Co.*, 364 F.3d 223, 228 n.3 (4th Cir. 2004) ("The statements cannot be dismissed as unverifiable opinion; they set forth or were grounded in actual past or present facts, which Plaintiffs demonstrated to be false." (internal citation marks omitted)).

> security (1) would consider the fact important in deciding whether to buy or sell the security or (2) would have viewed the total mix of information made available to be significantly altered by disclosure of the fact.

Longman v. Food Lion, Inc., 197 F.3d 675, 683 (4th Cir. 1999). Determining whether the facts of a particular case meet this standard "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Accordingly, we review for clear error the district court's determination, made after a bench trial, that Appellants' misrepresentations were material. *See Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 888 (9th Cir. 2008) (reviewing district court's findings on materiality for clear error); *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 754 (11th Cir. 2007) (same); *Lawton v. Nyman*, 327 F.3d 30, 42 (1st Cir. 2003) (same); *SEC v. Maio*, 51 F.3d 623, 637 (7th Cir. 1995) (same).

Applying that standard, we see no clear error in the district court's finding of materiality. Appellants promised investors that the information they were receiving was the product of a conversation with a company insider. The materiality determination thus turns on whether the reasonable investor would treat a particular stock recommendation differently depending on whether or not the recommender was

acting on inside information. We fail to see any clear error in the district court's determination that an investor *would* consider this question important in deciding whether to purchase the recommended security.[12] *Cf. Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090-91 (1991) (noting that statements by directors raise "no serious question" of materiality because directors "usually have knowledge and expertness far exceeding the normal investor's resources"). Moreover, purchasers of the USEC Special Report testified that it was important to them that the information conveyed in the report came

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[12] Appellants' arguments on appeal fail to address this point. Rather, they attempt to find error in the district court's consideration of stock price evidence to support its materiality finding, because there was an abundance of positive information about USEC on the market during the time period that Appellants circulated the solicitation e-mail and special report. According to Appellants, it was the positive media attention that USEC was receiving that led to an increase in USEC's share price, not securities purchases by purchasers of the USEC Special Report. Thus, the argument goes, the district court should not have relied on this stock price evidence to conclude that the misrepresentations were material.

This argument misconstrues the district court's opinion. The district court's materiality finding was not premised on market data; the district court only looked to the market data surrounding USEC as an additional way of confirming that the statements were material. Even if the district court should not have attributed the increase in trading volume and share price of USEC stock after May 14 to Appellants' communications, given the self-evident materiality of a claim that one possesses inside information, the district court's ultimate conclusion still would not amount to clear error.

from a source inside USEC, and that this characteristic influenced them to purchase the report and, subsequently, USEC stock. *See Harris v. Union Elec. Co.*, 787 F.2d 355, 366-67 (5th Cir. 1986) (finding no error in jury determination of materiality where the jury heard testimony from various purchasers and market experts); *Alton Box Board Co. v. Goldman, Sachs & Co.*, 560 F.2d 916, 922 (8th Cir. 1977) (noting the relevance of "testimony from sophisticated institutional purchasers that [omitted] facts would have been important to them"). In short, we find no clear error in the district court's conclusion that the misstatements in this case concerned material facts.

C.

Next, we consider whether Appellants acted with the requisite intent, or scienter. "[T]he term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). The SEC meets its burden of proving scienter by establishing that the speaker acted intentionally or recklessly; the negligent speaker, however, avoids liability. *Ottmann v. Hanger Orthopedic Group, Inc.*, 353 F.3d 338, 343-44 (4th Cir. 2003). Here, the district court determined that the SEC met its bur-den of proving that Stansberry acted with the requisite intent, and the court imputed Stansberry's scienter to Pirate.[13]

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[13] Specifically, the court held that "Stansberry's scienter is imputed to Pirate because he effectively controlled Pirate and

i.

In challenging the district court's scienter determination, Appellants contend that the First Amendment protections recognized by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), apply to this case. They claim that the SEC needed to prove by clear and convincing evidence that they acted with "actual malice." To support this claim, they direct us to *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), a case involving the application of the *New York Times* standard to a product disparagement action.

In *Bose*, the Supreme Court was concerned with determining the proper standard of review for courts of appeals to apply when confronted with a district court finding that a particular statement was made with the "actual malice" required by *New York Times*. After determining that the Constitution requires independent appellate review of "[t]he question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection," *id.* at 510-11, the *Bose* Court moved on to a review of the facts of that case and noted that "the only evidence of actual malice on which the District

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made the statements at issue on behalf of Pirate as an agent of Pirate, within the scope of his agency." (J.A. at 170.) Pirate and Stansberry do not challenge this aspect of the district court's decision.

Court relied was the fact that the statement was an inaccurate description of what [the defendant] had actually perceived," *id.* at 512. The *Bose* Court then held that the defendant's statement fell within the protections afforded by the First Amendment. *Id.* at 513.

Relying on the *Bose* Court's statement that "there is a significant difference between proof of actual malice and mere proof of falsity," *id.* at 511, Appellants argue that we cannot uphold the district court's resolution of the scienter issue because the district court "confused proof of falsity with proof of fault." (Appellants' Br. at 48.) They claim that there is no evidence in the record to support the district court's finding of scienter, absent the falsity of the claim that an insider provided the information on which they based the tip, and implore us to follow *Bose*'s lead by holding that an absence of additional evidence of intent necessarily means that the clear and convincing evidence standard mandated by *New York Times* has not been satisfied.

As we discuss elsewhere in this opinion, *see infra* Part III, we do not believe that the *New York Times* standard is applicable to this case. Thus, we reject Appellants' argument insofar as it relies on the mistaken belief that the SEC needed to prove intent by clear and convincing evidence, rather than under the preponderance of the evidence standard typically applicable to civil enforcement actions under § 10(b). Similarly, we reject the notion that independent appellate review of the district court's scienter determination is necessary under *Bose* and instead

review the district court's finding that Appellants acted with scienter for clear error. *See Merchant Capital,* 483 F.3d at 766 (questions of scienter are reviewable under the clearly erroneous rule); *see also Healey v. Chelsea Res., Ltd.,* 947 F.2d 611, 618 (2d Cir. 1991) ("Matters of misrepresentation, knowledge, reliance, causation, and scienter are questions of fact, and the trial court's findings as to those facts may not be set aside unless they are clearly erroneous.").

ii.

After reviewing the record, we are convinced that the district court's conclusion that Appellants acted with scienter was not clearly erroneous. The district court rested its conclusion on the circumstances surrounding the phone call between Stansberry and Wingfield. Having concluded that Wingfield did not, in fact, disclose to Stansberry that approval of the pricing agreement would be announced on May 22, the district court simply inferred that Stansberry, having been a party to that conversation, must have known that his claim that he had heard from a senior USEC executive that the announcement would occur on May 22 was false. The district court surmised that Stansberry "could not possibly have had a belief that the information he provided in the Super Insider Solicitation and Special Report was correct in all material respects" because he "knew full well that Wingfield had not told him that the pricing agreement would be announced on May 22." (J.A. at 170.)

We see nothing clearly erroneous about this conclusion. The district court did not premise its finding on the falsity of the statements, but on the fact that Stansberry was in a position to know whether or not his statements were true. As other courts have recognized, the fact that a defendant publishes statements when in possession of facts suggesting that the statements are false is "classic evidence of scienter." *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 83 (1st Cir. 2002); *see also Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 665 (8th Cir. 2001) ("One of the classic fact patterns giving rise to a strong inference of scienter is that defendants published statements when they knew facts or had access to information suggesting that their public statements were materially inaccurate."). Stansberry, having conducted the interview with Wingfield, would have known whether or not Wingfield told him to "watch the stock on May 22nd." Once the district court found that Wingfield never made such a statement, there is nothing controversial in drawing the logical conclusion — that Stansberry would know that his claim was false.[14]

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[14] Appellants' only rejoinder to this point is to beat a retreat to more First Amendment case law by directing us to defamation cases where courts have been unwilling to find actual malice because the finding would depend on the resolution of a dispute between a source and a writer about what was said in a conversation. We do not find these cases relevant, however, as they appear to rest their holdings on the higher burden of proof applicable to defamation actions. The court in *Long v. Arcell*, 618 F.2d 1145 (5th Cir. 1980), for

In addition, it would take an act of willful blindness to ignore the fact that Appellants profited from the false statements. Appellants surely knew that absent claims of insider knowledge, it is highly unlikely that investors would pay $1,000 for a stock recommendation. This inference is borne out by the emphasis that the solicitation e-mail placed on the "inside" nature of the tip as it encouraged investors to purchase the USEC Special Report. Given such a clear financial motive for the misrepresentations, the district court's conclusion that they were made with scienter is hardly surprising. The clear error standard of review demands something much more egregious than what confronts us here. *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988) ("To be clearly erroneous, a decision must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.").

D.

Finally, we turn to § 10(b)'s fourth requirement, the "in connection with" requirement. Appellants claim that the fraud in this case did not make the necessary connection to securities transactions because Appellants did not trade in USEC stock or breach any fiduciary duties. We disagree, and for the reasons discussed below we find no error in the district court's determination that Appellants

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example, admitted that "[i]f the applicable burden of proof had been a preponderance of the evidence, a jury verdict either way would have to stand." *Id.* at 1148.

committed fraud "in connection with" the purchase or sale of securities.

"The Supreme Court has consistently embraced an expansive reading of § 10(b)'s 'in connection with' requirement." *SEC v. Wolfson,* 539 F.3d 1249, 1262 (10th Cir. 2008); *see also SEC v. Zandford,* 535 U.S. 813, 819 (2002) ("In its role enforcing the Act, the SEC has consistently adopted a broad reading of the phrase 'in connection with the purchase or sale of any security.'"). We construe the statute "not technically and restrictively, but flexibly to effectuate its remedial purposes." *Zandford,* 535 U.S. at 819 (internal quotation marks omitted). Under Supreme Court case law, fraudulent activity meets the "in connection with" requirement of § 10(b) whenever it "touches" or "coincides" with a securities transaction. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,* 547 U.S. 71, 85 (2006) ("Under our precedents, it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else."); *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.,* 404 U.S. 6, 12-13 (1971) (holding "in connection with" requirement satisfied where injury occurred "as a result of deceptive practices touching [a] sale of securities").

Of course, to say that a fraud is "in connection with" a securities transaction whenever it "coincides" with that transaction hardly clarifies the matter. We find direction in several factors that other courts have considered relevant when determining whether the "in connection with" requirement has been satisfied in a particular case. These factors include,

but are not limited to: (1) whether a securities sale was necessary to the completion of the fraudulent scheme, *Zandford,* 535 U.S. at 820-21; (2) whether the parties' relationship was such that it would necessarily involve trading in securities, *Rowinski v. Salomon Smith Barney Inc.,* 398 F.3d 294, 302-03 (3d Cir. 2005); (3) whether the defendant intended to induce a securities transaction, *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.,* 210 F.3d 1207, 1221 (10th Cir. 2000), *aff'd,* 532 U.S. 588 (2001); and (4) whether material misrepresentations were "disseminated to the public in a medium upon which a reasonable investor would rely," *Semerenko v. Cendant Corp.,* 223 F.3d 165, 176 (3d Cir. 2000). Importantly, these factors are not mandatory requirements that a fraud must satisfy in order to meet § 10(b)'s "in connection with" requirement. They exist merely to guide the inquiry, and we do not presume to exclude other factors that could help distinguish between fraud in the securities industry and common law fraud that happens to involve securities. *See Zandford,* 535 U.S. at 820; *see also Stoneridge Inv. Partners,* 128 S. Ct. at 771 ("Though § 10(b) is not limited to preserving the integrity of the securities markets, it does not reach all commercial transactions that are fraudulent and affect the price of a security in some attenuated way." (internal citations and quotation marks omitted)). Moreover, a fraud need not satisfy all of the factors to be "in connection with" a securities transaction; a close fit with one factor may well be enough for a fraud to result in § 10(b) liability. The application of the factors should be rooted in the understanding that the "in connection with" requirement is a flexible one

and that questions concerning its scope are best examined on a case-by-case basis. *See Semerenko,* 223 F.3d at 175 (noting that "the scope of the 'in connection with' requirement must be determined on a case-by-case basis"); *Chem. Bank v. Arthur Andersen & Co.,* 726 F.2d 930, 942 (2d Cir. 1984) ("In cases near the borderline, courts have warned that '[i]t is important that the standard be fleshed out by a cautious case-by-case approach.'" (quoting *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 595 (5th Cir. 1974))).

i.

We first consider whether a securities transaction was necessary to the completion of the fraudulent scheme. In *Zandford,* for example, the Supreme Court noted that the stock sales in that case were a fundamental component of the defendant's fraudulent scheme:

> [E]ach sale was made to further respondent's fraudulent scheme; each was deceptive because it was neither authorized by, nor disclosed to, the Woods. With regard to the sales of shares in the Woods' mutual fund, respondent initiated these transactions by writing a check to himself from that account, knowing that redeeming the check would require the sale of securities.

Zandford, 535 U.S. at 820-21. *See also Alley v. Miramon,* 614 F.2d 1372, 1378 n.11 (5th Cir. 1980)

("[T]he 'in connection with' test . . . is satisfied when the proscribed conduct and the sale are part of the same fraudulent scheme."); *In re Franklin Mut. Funds Fee Litig.*, 388 F. Supp. 2d 451, 472 (D.N.J. 2005) ("[T]he only way for this scheme to succeed was for investors to purchase securities (shares of the defendant mutual funds).").

Appellants argue that the fraud in this case was complete when investors purchased the USEC Special Report because the $1,000 purchase price was the only material benefit that Appellants received. Under this theory of the case, Appellants derived no benefit from the purchasers' securities trading. They claim:

> [T]he alleged fraud was consummated and concluded when the Report was sold and the reader paid $1000. If there was a fraudulent scheme, no subsequent securities transactions were necessary to it, as neither the Publisher nor the Author derived any benefit from such trading. Indeed, the defendants would have committed fraud if not a single purchaser of the Report bought USEC shares, or if the Report named a fictitious company with a fictitious ticker symbol, because they still would have 'defrauded' readers of the cost of the publication.

(Reply Br. at 9.) We believe that this is a rather short-sighted view of the fraudulent scheme and, taking the facts in the light most favorable to the

SEC, we conclude that Appellants did benefit from securities trading by purchasers of the USEC Special Report.

First, Appellants' characterization of the fraud fails to recognize that Appellants used stock purchases by early purchasers of the USEC Special Report as a way of enhancing the credibility of the report. Over 800,000 investors received the Super Insider Tip E-mail that offered the USEC Special Report for sale, but they did not receive the solicitation at the same time. Rather, Appellants sent out the solicitation in waves to various groups of investors. And, later versions of the solicitation pointed to a rise in USEC's stock price — which the district court determined was the result of purchases by early recipients of the solicitation and special report — as supporting the trustworthiness of the tip.

When Stansberry first circulated the solicitation to the Pirate Investor Blast Database, on May 13, the solicitation noted that the stock was "only a $7.00 stock." (J.A. at 2979.) On May 17, however, Stansberry edited the solicitation e-mail to reflect a change in the stock's price. Future versions of the e-mail reflected the stock's updated price of $9.00 a share. Moreover, and most importantly, future versions of the solicitation e-mail used this jump in price as a selling point. The e-mail pointed out that the stock in question "has jumped this week and looks poised to go much higher," and quickly followed with an offer to sell the identity of the company for $1,000. (J.A. at 3034.) Thus, the rising stock was important to the success of the scheme because it

served to motivate later purchasers to part with their requisite $1,000 payment. The fraud was not complete when investors paid $1,000 to learn the identity of the company in question; Appellants also needed those investors to purchase the stock thereby increasing the stock price so as to boost the credibility of the solicitation e-mail to obtain more $1,000 payments.

These facts are similar to those that the Third Circuit faced in *Rowinski.* In that case, Salomon Smith Barney, a stock brokerage and investment firm, allegedly provided "research [that] was unlawfully biased in favor of the firm's investment banking clients, to the detriment of its retail brokerage customers." *Rowinski,* 398 F.3d at 296. Specifically, the plaintiffs alleged that Salomon Smith Barney systematically misrepresented the value of securities to investors who used the firm's retail brokerage services in order to "curry favor with investment banking clients and reap hundreds of millions of dollars in investment banking fees." *Id.* at 296-97. Seeking to avoid the provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), which provides for the removal and federal preemption of certain state court class actions alleging "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," 15 U.S.C.A. § 78bb(f)(1)(A) (West 2009), the plaintiffs argued that the fraud in

that case did not occur "in connection with the purchase or sale of a covered security."[15]

Much like Appellants' argument that the conduct in this case sounds in common law fraud, the plaintiffs in *Rowinski* argued that their complaint stated a "straightforward breach of contract claim, *i.e.,* Salomon Smith Barney agreed to provide unbiased investment research and failed to provide it." *Rowinski,* 398 F.3d at 300. The Third Circuit disagreed, observing:

> For this purported scheme to work, investors must purchase the misrepresented securities. Absent purchases by "duped" investors and a corresponding inflation in the share price, Salomon Smith Barney's biased analysis would fail to benefit its banking clients and, in turn, would fail to yield hundreds of mil-lions of dollars in investment banking fees. The scheme, in

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[15] While in *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294 (3d Cir. 2005), the Third Circuit was considering the "in connection with" requirement in the context of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), its interpretation was tied to existing doctrine under § 10(b). *Rowinski,* 398 F.3d at 299; *see also Instituto de Prevision Militar v. Merrill Lynch,* 546 F.3d 1340, 1348 (11th Cir. 2008) ("'[I]n connection with the purchase or sale' of a security under SLUSA covers the same range of activities that the SEC could prosecute as violations of § 10(b) and Rule 10b-5."); *Siepel v. Bank of Am., N.A.*, 526 F.3d 1122, 1127 (8th Cir. 2008) (same).

> other words, necessarily "coincides" with the purchase or sale of securities.

Rowinski, 398 F.3d at 302. In other words, the alleged fraud was not confined to the firm's representations to individual investors — the court realized that the stock purchases of investors who acted on that advice would lead to third parties, the companies, providing a benefit to the firm. Likewise, in this case Appellants used the inflation in the stock price caused by investors who purchased USEC stock in reliance on early versions of the USEC Special Report to influence third parties — investors who received the updated versions of the solicitation — to purchase copies of the USEC Special Report. Thus, securities transactions helped Appellants to maximize the profitability of their scheme.

In addition, the record shows that Appellants were not only relying on the rise in USEC's stock price to boost the credibility of this particular stock recommendation. They expected that the rise in USEC's price would lead to a general increase in Appellants' reputation as trusted purveyors of internet investment advice. The fraud's ultimate success involved not only the $1,000 purchase price, but also the boost in reputation that would accrue with those who purchased stock in reliance on the report — a reputational gain that would lead to future purchases of future reports on different companies. As Stansberry noted in an e-mail, "[i]f we're able to sell this to 250 people *and it works*, we'll be able to charge almost whatever we want next time." (J.A. at 3143) (emphasis added). In effect,

Appellants' own definition of success depended on people purchasing securities in reliance on the report.

ii.

The next factor that we consider — whether the parties' relationship was such that it would necessarily involve trading in securities — weighs in favor of Appellants. Appellants sold investment advice; ultimately, the decision to purchase securities rested squarely with those who received the solicitation and USEC Special Report. In this respect, Appellants differ from the defendant in *Zandford.* In that case the defendant, a broker, possessed a general power of attorney — granted by his victims — allowing him to engage in securities transactions on their behalf. 535 U.S. at 815. The very purpose of the broker/investor relationship is trading in securities. *Rowinski,* 398 F.3d at 303. No such relationship existed in this case.

Indeed, we believe that the lack of a trading relationship serves to distinguish this case from one of the cases relied on by the SEC and the district court, *SEC v. Terry's Tips, Inc.,* 409 F. Supp. 2d 526 (D. Vt. 2006). Like Appellants, the defendant in *Terry's Tips* was an online financial advisor who made trading recommendations. *Id.* at 529. Significantly, however, the SEC's case against the defendant in *Terry's Tips* revolved around misrepresentations relating to the defendant's provision of auto-trading services. In an auto-trading arrangement, subscribers authorize an online financial adviser to direct trades on their behalf — the customers often are not aware of the trades until

after they have already occurred.[16] In such a scenario, the adviser is no longer merely a purveyor of information to investors who can choose to invest or not invest. Rather, in such a relationship investors explicitly delegate their decision-making authority to the online investment advisor; the parties'

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[16] As explained by the court in that case:

> Auto-trading is an investment vehicle in which subscribers to online investment newsletters open auto-trading accounts with brokerage firms, and authorize the online adviser to direct the trades in the subscribers' accounts. Auto-trading services are typically offered as an additional service provided by online financial newsletters. The financial newsletters usually require subscribers to pay a fee to auto-trade in addition to the subscription fee paid to receive the general newsletter. The online adviser has arrangements with one or more broker-dealers that accept the adviser's auto-trading customers. The auto-trading customer sets up a brokerage account with a broker-dealer and executes a power of attorney or trading authorization authorizing the broker-dealer to automatically execute trades in the customer's account on instructions from the online adviser. Once the broker-age account is established, the online adviser sends specific trading instructions by e-mail or facsimile to the broker-dealer. These instructions are timed to take advantage of market events, and the customer usually learns of the trades only after they have been executed by the broker-dealer.

SEC v. Terry's Tips, Inc., 409 F. Supp. 2d 526, 529-30 (D. Vt. 2006).

relationship becomes one that would necessarily contemplate trading in securities. The parties in this case contemplated no such arrangement.

iii.

The third factor we consider is whether Appellants made their misrepresentations with the intent to induce a securities transaction. *Compare United Int'l Holdings, Inc.*, 210 F.3d at 1221 (representations made with the purpose of inducing the purchase of an option are made "in connection with" the purchase or sale of a security), *and SEC v. Jakubowski*, 150 F.3d 675, 679 (7th Cir. 1998) (statements made directly to the issuer in order to induce the issuer to accept an offer to purchase satisfy the "in connection with" requirement), *with Ketchum v. Green*, 557 F.2d 1022, 1028 (3d Cir. 1977) ("in connection with" requirement unsatisfied where the purpose of the deception was not to cause a securities transaction). *See also Zandford*, 535 U.S. at 823-24 (noting defendant's secret intent to keep the proceeds from sales of his client's stock); *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993) (noting that defendant "intended to affect the market for [the] stock"). On this point we find no error in the district court's conclusion that "[t]he very essence of the fraudulent scheme was to induce its victims to purchase USEC stock prior to May 22, 2002 . . . ." (J.A. at 174.) We have already discussed how securities purchases by recipients of the misrepresentations would inure to the benefit of Appellants, and we believe that the text of the USEC Special Report itself forecloses any argument that

Appellants did not intend for investors to purchase securities in reliance on the false statements.

The USEC Special Report, which, it bears repeating, Appellants sent to investors *after* those investors had parted with their $1,000, *repeated* the false claim that "[a] USEC senior executive has assured me that the new Russian agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said '*watch the stock on May 22nd.*" (J.A. at 3111.) The report also called upon investors to "call your broker now and tell him to buy shares of USEC." (J.A. at 3109.) This raises the question: If, as Appellants claim, the misrepresentations were only intended to induce investors to purchase the USEC Special Report, why were they repeated in the report itself, which directly called investors to action? The record evidence compels the conclusion that Appellants intended the recipients of the solicitation and the USEC Special Report to trade in securities.

iv.

Finally, we turn to the factor that the district court primarily relied on in making its determination that the fraud satisfied the "in connection with" requirement — whether Appellants utilized a device "that would cause reasonable investors to rely thereon" and "so relying, cause them to purchase or sell a corporation's securities." *In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d 153, 156 (2d Cir. 1998) (internal quotations omitted). This standard is derived from a Second Circuit opinion, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc). In *Texas Gulf*, the Second Circuit held that

"Rule 10b-5 is violated whenever assertions are made . . . in a manner reasonably calculated to influence the investing public . . . ." *Id.* at 862. Subsequent decisions have refined *Texas Gulf,* and several circuits now agree that:

> Where the fraud alleged involves public dissemination in a document such as a press release, annual report, investment prospectus or other such document on which an investor would presumably rely, the "in connection with" requirement is generally met by proof of the means of dissemination and the materiality of the misrepresentation or omission.

Rana Research, Inc., 8 F.3d at 1362; *see also Wolfson,* 539 F.3d at 1262; *Semerenko,* 223 F.3d at 176.

Under the *Texas Gulf* standard, the SEC must establish two distinct elements: (1) the misrepresentations in question were disseminated to the public in a medium upon which a reasonable investor would rely and (2) they were material when disseminated. *Semerenko,* 223 F.3d at 176. We have already considered whether the misrepresentations in this case were material. Here, we focus our attention on the first element of *Texas Gulf.* The SEC must show that reasonable investors would base their investment decisions on the *types* of

communications at issue in this case — mass e-mails from a purveyor of internet investment advice.[17]

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[17] Appellants claim that the *Texas Gulf* standard only is relevant when evaluating communications occurring in a particular context — specifically, statements made in corporate communications from issuers to investors. They argue: "The reasonableness standard of *Texas Gulf* is tied to fiduciary duty." (Reply Br. at 11.) And, because they claim that no fiduciary duty runs between a publisher of an investment newsletter and its readers, Appellants submit that the *Texas Gulf* standard cannot properly apply to this case.

Courts, however, have not applied *Texas Gulf* so narrowly. In *Rana Research, Inc.*, for example, an individual interested in acquiring a publicly traded company disseminated a press release falsely claiming that there was a "firm offer" to purchase the company's shares at a certain price, even though the company's president, who was also a major stock-holder, had communicated that the company had no interest in being acquired in a buyout. 8 F.3d at 1360. The potential purchaser had hoped to use the press release as a way of pressuring the company's president to present the offer to the board of directors. *Id.* The Ninth Circuit held that those facts satisfied the "in connection with" requirement, though the potential purchaser owed no fiduciary duty to shareholders of the company. *Id.* at 1362-63.

Similarly, in *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000), the Third Circuit applied *Texas Gulf* to statements made by one company that affect the stock price of a different company. In that case American Bankers Insurance Group, Inc. was the subject of competing tender offers by AIG and Cendant Corp., and Cendant overstated its income in forms it filed with the SEC in conjunction with its tender offer. *Id.* at 170. The Third Circuit held that the *Texas Gulf* standard applied to claims that purchasers of ABI stock brought against Cendant. *Id.* at 176. *Texas Gulf* applied even though Cendant owed no

At first glance, we question whether any reasonable investor would rely on the Super Insider Tip E-mail.[18] As we noted above, the *Texas Gulf*

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fiduciary duties to purchasers of ABI stock. Accordingly, we see no requirement that we limit application of the *Texas Gulf* standard only to statements made in the context of a fiduciary relationship.

We do believe, however, that whether such a relationship exists is relevant to the question of whether a particular communication meets the *Texas Gulf* standard in a particular case. The standard does ask, after all, whether misrepresentations have been disseminated in a medium upon which a *reasonable* investor would rely, and we think it rather self-evident that documents created and dispersed by fiduciaries are more likely to meet the *Texas Gulf* threshold, and thus satisfy the "in connection with" element of § 10(b), than those that are not. On this point we agree with the following observation by the Second Circuit:

> [W]hen the fraud alleged is that the plaintiff bought or sold a security in reliance on misrepresentations as to its value, made by a defendant whose position made it reasonable for the plaintiff to rely on the representation and imposed some duty on the defendant to be honest or to disclose information, then whatever problems there may be with the case, a connection between the fraud and the transaction should not be one of them.

In re Ames Dep't Stores, Inc. Stock Litig., 991 F.2d 953, 967 (2d Cir. 1993).

[18] The record contains scant evidence on this point, but what little information is in the record suggests that reasonable investors would not rely on the communication at issue. For example, the SEC cross-examined one of Stansberry's experts,

standard encompasses "press release[s], annual report[s], investment prospectus[es] or *other such* document[s]." *Rana Research, Inc.*, 8 F.3d at 1362. Courts have applied this standard, for example, when misrepresentations are disseminated in investment research reports from a reputable broker, *see Rowinski*, 398 F.3d at 302; prospectuses, *see In re Lord Abbett Mut. Funds Fee Litig.*, 407 F. Supp. 2d 616, 628 (D.N.J. 2005); the sales and marketing materials at brokerage houses and other points of sale, *In re Dreyfus Mut. Funds Fee Litig.*, 428 F. Supp. 2d 342, 355 (W.D. Pa. 2005); SEC filings, *In re Tyco Int'l, Ltd. Multidistrict Litig.*, No. 02-266-B, 2004 U.S. Dist. LEXIS 20733, at *15-16 (D.N.H. 2004); and detailed drug advertisements published in sophisticated medical journals, *In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d at 156. Clearly, the communications at issue in the present case have

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David Nelson, regarding one of the texts that Nelson relied on when preparing his report. The SEC presented the following excerpt:

> Essentially critics of the investment letters have argued that the advisers are ignorant, they may have no formal experience or education in investment, incompetent, their investment record can be bad, dishonest, they can lie about their records, jerks, all of which can be true.

(J.A. at 1212.) Other statements from the text that the SEC pointed to include "Investors newsletters accurate as a coin flip" and "Their advice was no better than throwing a dart at the stock quotes page of the Wall Street Journal and buying whatever it hits." (J.A. at 1215-16.)

little in common with the types of communications that have heretofore led to liability under the *Texas Gulf* standard. *Cf. SEC v. Benson*, 657 F. Supp. 1122, 1131 (S.D.N.Y. 1987) (registration statements and annual and quarterly reports are clearly the types of documents that investors rely on). In fact, we feel confident that a reasonable investor would not base investment decisions on mass e-mail communications such as these — which the SEC's attorney characterized as SPAM during oral argument — that purport to offer a stock tip based on insider information.

Thus, at first blush, it would appear that this factor weighs in favor of Appellants' arguments. We fear, however, that applying the *Texas Gulf* standard to remove Appellants' fraud from coverage under § 10(b) would neglect the reasoning behind the *Texas Gulf* standard. At its core, the *Texas Gulf* standard is about notice — attaching liability under the securities laws for statements made in any medium, no matter how tangentially related to the securities markets, would run the risk of roping in speakers who had no idea that their conduct might implicate Section 10(b). Thus, by requiring that misstatements be communicated in a medium upon which a *reasonable* investor would rely, the *Texas Gulf* standard protects these unknowing speakers from liability and ensures that there is a sufficient nexus between the misrepresentations and the securities sales that they induce to satisfy the Supreme Court's command that the fraud and securities sales "coincide."

This case simply does not implicate the notice concerns that animate the *Texas Gulf* standard. To the contrary, Appellants knew that recipients of the solicitation and USEC Special Report would rely on them when making their investment decisions. After all, Appellants did not target the public at large when they circulated the solicitation e-mail. Rather, Appellants circulated the e-mail solicitation to investors on the specific subscriber lists of internet investment newsletters. These were investors who trusted internet investment advice — Appellants certainly should not have been shocked to learn that their fraudulent statements induced securities transaction. Under these circumstances, an application of the *Texas Gulf* standard to exclude the communications would run contrary to § 10(b)'s core purpose — "to protect investors, to prevent inequitable and unfair practices and to insure fairness in securities transactions generally." 3 Fletcher Cyc. Corp. § 900.65 (perm. ed. 2002). Although ordinary reasonable investors might well have taken one look at Appellants' solicitation and marked it for the SPAM box, Appellants *knew* that they were directing their misstatements to particular investors who *did rely* on internet investment advice. We believe that this knowledge supports finding that the misstatements occurred "in connection with" securities transactions.[19] *See SEC v. Park*, 99 F.

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[19] On this point we take direction from the common law's treatment of the materiality standard. Under the common law, a representation may be material, even if a reasonable man would disregard it, if "the maker of the representation knows or has reason to know that its recipient regards or is likely to

Supp. 2d 889, 900 (N.D. Ill. 2000) ("[F]raud in the sale of investment advice may qualify as 'in connection' with the sale of securities when it is expected that the advisees will act on the advice."

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regard the matter as important in determining his choice of action." Restatement (Second) of Torts § 538(2)(b) (1977). As the comments to the Restatement explain:

> Even though the matter misrepresented is one to which a reasonable man would not attach any importance in determining his course of action in the transaction in hand, it is nevertheless material if the maker knows that the recipient, because of his own peculiarities, is likely to attach importance to it. There are many persons whose judgment, even in important transactions, is likely to be determined by considerations that the normal man would regard as altogether trivial or even ridiculous. *One who practices upon another's known idiosyncrasies cannot complain if he is held liable when he is successful in what he is endeavoring to accomplish.*

Id. cmt. f (emphasis added). While we do not suggest that the Restatement's treatment of materiality controls our analysis of § 10(b)'s "in connection with" requirement, we do note that the Supreme Court often turns to the Restatement to inform its jurisprudence on these issues. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 344 (2005); *Wharf (Holdings) Ltd.*, 532 U.S. at 596. Moreover, and more importantly, we believe the above principle to be a sound one — Appellants have little room to complain that their conduct has implicated § 10(b) when they knew that readers would rely on the communications and they actively encouraged them to do so.

(citing *R&W Technical Servs. Ltd. v. CFTC*, 205 F.3d 165, 172-73 (5th Cir. 2000)).[20]

v.

As our previous discussion shows, there are at least three reasons to conclude that the fraud in this case occurred "in connection with" the purchase or sale of securities. First, record evidence supports a conclusion that securities purchases were necessary to complete Appellants' fraudulent scheme. Second, such evidence supports the district court's finding that Appellants made their misrepresentations with the intent to induce securities transactions. And, third, Appellants directed the misrepresentations to investors that they knew were likely to rely on them. Given these characteristics, the application of § 10(b) is not barred by the fact that there was no securities trading relationship between the Appellants and the recipients of the e-mail misrepresentations.

Appellants, however, joined by *amici*, argue that our treatment of the "in connection with" requirement raises First Amendment issues: "As

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[20] Our conclusion here does not imply that an individual investor in this case would be able to demonstrate that he "justifiably relied" on the Super Insider Tip E-mail as required to establish a securities violation in a private suit. *See Miller v. Arsenio & Co., Inc.*, 364 F.3d 223, 227 (4th Cir. 2004). Although the two types of reliance may share some similarities, it would not be appropriate to import wholesale our "reasonable reliance" analysis into a "justifiable reliance" analysis required in a private suit.

applied in the way the SEC now urges, § 10(b) would not be restricted to the statements of fiduciaries or those who trade in stocks, but would cover *all* statements about securities by anyone who cared to speak to anyone who cared to listen." (Appellants' Br. at 33.) The great concern is that publishers of financial news and commentary will face potential liability under § 10(b) and that this will chill publishers' attempts to report on financial matters. The *amici*, in particular, point out that financial news and commentary is especially important because so many Americans are actively involved in trading in the securities markets and there is a high demand for information about investment opportunities. Appellants and the *amici* argue that these constitutional concerns require that we interpret § 10(b)'s "in connection with" requirement narrowly, and they suggest that we can do so by recognizing an exception from the coverage of § 10(b) for publishers of nonpersonalized financial news and commentary who do not possess a financial interest in the securities that they discuss.

To support this claim, Appellants direct us to *Lowe v. SEC*, 472 U.S. 181 (1985). In *Lowe*, the Supreme Court faced the question of whether the petitioner, who had been convicted of various offenses involving securities, could be permanently enjoined from publishing securities newsletters because he had not registered as an investment adviser under the Investment Advisers Act of 1940. That Act defines an investment adviser as, and thus requires registration for, "any person who, for compensation, engages in the business of advising others, either

directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . . ." 15 U.S.C.A. § 80b-2(a)(11) (West 2009). The Court conceded that the petitioner's activities fell within this definition, but noted that Congress, expressing its recognition of the serious First Amendment problems implicated by a law requiring registration of the press, *see Lovell v. City of Griffin*, 303 U.S. 444 (1938), included a statutory exception for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation," § 80b-2(a)(11)(D). *Lowe*, 472 U.S. at 203-05. The Court, noting that First Amendment concerns "support[ed] a broad reading of the exclusion for publishers," concluded that the petitioner's newsletters were "described by the plain language of the exclusion" and were thus exempt from coverage under the Investment Advisers Act. *Id.* at 205-06, 211.

Appellants argue that the canon of constitutional avoidance, which compelled the Supreme Court to read broadly the exception for publishers in the Investment Advisers Act, like-wise requires that we *create* a new exception for disinterested publishers from the coverage of § 10(b) of the Exchange Act. The district court rejected this argument by reasoning that, even if there were an exception from § 10(b) for such publishers, Appellants could not invoke the exception because the Super Insider Solicitation and the Special Report were not publications "of regular

and general circulation," as the *Lowe* Court interpreted those terms. While we do not agree with its reasoning, we do agree with the district court's ultimate conclusion — that Appellants fall within the coverage of § 10(b).[21] The district court's ultimate conclusion was correct because, quite simply, the text and purpose of § 10(b) admit of no exclusion for "disinterested publishers" of financial news and commentary, thus rendering constitutional avoidance arguments irrelevant.

The canon of constitutional avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez,* 543 U.S. 371, 381 (2005). The canon is a tool of limited purpose, however. As the Court quite recently explained: "The canon of constitutional avoidance does not supplant traditional modes of statutory interpretation. We

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[21] The "regular and general" requirement relied upon by the district court is a statutory requirement for exclusion under the Investment Advisers Act — it is a representation of how Congress chose to accommodate First Amendment concerns with respect to that particular Act. Appellants argue that, in the § 10(b) context, First Amendment concerns compel an exemption for disinterested publishers regardless of whether the publications are "regular and general." By holding that Appellants were not entitled to an exemption because the publications were not "of regular and general circulation," the district court failed to recognize that such regular and general circulation is not a requirement for the exemption Appellants seek.

cannot ignore the text and purpose of a statute in order to save it." *Boumediene v. Bush,* 128 S. Ct. 2229, 2271 (2008) (citations omitted). Accordingly, we utilize the canon "only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means* of *choosing between them." Clark,* 543 U.S. at 385. If traditional modes of statutory construction sufficiently resolve the issue, then, there is no need to reach deeper into our toolbox. And, in this case, we believe that ordinary principles of statutory construction foreclose the argument that we can interpret § 10(b) to include an exception for disinterested publishers.

The first step in any case of statutory interpretation is to consider the language of the statute in order "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997)). "When the words of a statute are unambiguous, . . . this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 462 (quoting *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 254 (1992)). Thus, we must first consider the text of § 10(b), and Appellants direct us to the "in connection with" requirement, claiming that the requirement is "exactly the sort of loose, ambiguous language that must be confined to avoid constitutional concerns." (Appellant's Br. at 34.)

We are mindful, however, that "statutes are not read as a collection of isolated phrases." *Abuelhawa v. United States,* 173 L. Ed. 2d 982, 987 (2009). Looking to the entire statute, § 10(b), by its plain language, applies to *any person.* In this respect, § 10(b) is wholly different from the statute the Supreme Court interpreted in *Lowe,* where the Supreme Court used First Amendment concerns in interpreting an *already existing* exception broadly. Section 10(b) excepts no one from its reach, and the *Lowe* Court recognized that the statute constitutes a backstop against fraudulent activity — even those publishers otherwise excepted from the provisions of the Investment Advisers Act remained subject to the coverage of § 10(b). *See Lowe,* 472 U.S. at 209 n.56. Thus, we find Appellants' reliance on *Lowe* unpersuasive, because § 10(b) includes no exceptive language of the type that the Supreme Court interpreted in that case.

Even if we focus solely on § 10(b)'s "in connection with" language, we note that Congress intended the requirement to be flexible. Indeed, the Supreme Court has described § 10(b) as "a catchall clause to enable the Commission to deal with new manipulative or cunning devices." *Hochfelder,* 425 U.S. at 203 (internal quotation marks and alterations omitted); *see also United States v. Russo,* 74 F.3d 1383, 1390 (2d Cir. 1996) ("The purpose of the Section and its implementing regulations is to prevent fraud, whether it is 'a garden type variety of fraud, or present[s] a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.'" (quoting *Bankers Life & Cas.*

Co., 404 U.S. at 11 n.7)). It necessarily must be applied to radically different and ever-evolving sets of facts, and that goal is accomplished by interpreting the statute flexibly.[22] Thus, Appellants' reliance on any ambiguity in the phrase "in connection with" as a reason to employ the canon of constitutional avoidance fails in light of the statute's purpose — providing a flexible regime for addressing new, perhaps unforeseen, types of fraud. Creating a blanket exception for "disinterested publishers" hardly seems consistent with this purpose, and the Supreme Court has required that we avoid "technical[ ] and restrictive[ ]" interpretations of the statute. *Zandford*, 535 U.S. at 819 (internal quotation marks omitted).

E.

To conclude our discussion of § 10(b), we find the district court correctly found that Appellants' conduct

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[22] For example, while originally directed at preventing buyers and sellers of securities from deliberately misleading each other for the purpose of inducing a transaction, *see SEC v. Tambone*, 550 F.3d 106, 122 n.20 (1st Cir. 2008), § 10(b) now covers a variety of fraudulent activity, including insider trading, *see, e.g., Chiarella v. United States*, 445 U.S. 222, 228-29 (1980); a broker's theft of the proceeds from sales of his clients' securities, *Zandford*, 535 U.S. at 822; misstatements by accountants who know that their communications will be communicated to investors, *see Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1225-27 (10th Cir. 1996); and even a company's false advertisements in medical journals, *In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d 153, 156-57 (2d Cir. 1998).

constituted a violation of the statute. Appellants made misrepresentations of a material fact — whether an insider had provided the information in the stock tip — and Appellants did so with the requisite scienter. Moreover, the misrepresentations were "in connection with" securities transactions because securities transactions were necessary to maximize the fraudulent scheme, Appellants made their misrepresentations with the intent that investors would rely on them, and Appellants knew that investors would so rely. This conduct violates § 10(b), and Appellants cannot avoid application of the statute by invoking constitutional concerns because the text and purpose of § 10(b) admit of no exception for "disinterested publishers."

III.

We next consider Appellants' argument that, even if their conduct fell within the coverage of § 10(b), the Super Insider Tip E-mail and USEC Special Report constitute speech entitled to some measure of First Amendment protection. Admittedly, our conclusion that constitutional concerns do not compel an exclusion from § 10(b) for Appellants' conduct does not answer this question. The canon of constitutional avoidance is a method of statutory interpretation, not a way of adjudicating constitutional issues. Defendants remain free to bring constitutional challenges to a statute as applied to their conduct, and in this case Appellants argue that the district court should have found that the Super Insider Tip E-mail and USEC Special Report were entitled to the heightened protections for

expression that the Supreme Court recognized in *New York Times Co. v. Sullivan,* because the SEC sought to impose liability on the basis of "pure expression" — Appellants' recommendation of USEC stock. Under this theory the SEC should have borne the burden of proving by clear and convincing evidence that the statements were published with "actual malice," and we would have to engage in an independent review of the record in order to ensure that the SEC met that burden. According to Appellants, the Constitution requires that we recognize these protections whenever we impose liability on the alleged falsity of a publication.

We cannot agree with Appellants. Punishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment. The Seventh Circuit has articulated this principle in *Commodity Trend Serv., Inc. v. CFTC,* 233 F.3d 981, 992 (7th Cir. 2000), explaining: "Laws directly punishing fraudulent speech survive constitutional scrutiny even where applied to pure, fully protected speech." The Supreme Court has stated the principle almost as directly: "[T]he First Amendment does not shield fraud." *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.,* 538 U.S. 600, 612 (2003). Of course, the government cannot label certain speech as fraudulent so as to deprive it of its constitutional protections, *id.* at 617, but we need not worry about such strategic labeling here because § 10(b) clearly forbids actual fraud. Thus, Appellants' First Amendment argument fails.

IV.

For this same reason, Appellants' challenge to the district court's issuance of an injunction permanently enjoining them from violating §o fails. The injunction does not constitute an unlawful prior restraint because it only enjoins Appellants from engaging in securities fraud, which we have held is unprotected speech.[23]

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[23] Appellants also argue — but only in their reply brief — that the injunction is a disfavored "obey the law" injunction, because the injunction merely tracks the language of § 10(b) and Rule 1 0b-5 in describing the prohibited conduct. Federal Rule of Civil Procedure 65(d) requires that injunctions "describe in reasonable detail . . . the act or acts restrained or required," and several circuits have relied on Rule 65(d) to require that injunctions do more than instruct a defendant to "obey the law." *See, e.g., Burton v. City of Belle Glade,* 178 F.3d 1175, 1201 (11th Cir. 1999); *Payne v. Travenol Labs., Inc.,* 565 F.2d 895,

V.

In conclusion, for the reasons stated above, the judgment of the district court is

AFFIRMED.

897-98 (5th Cir. 1978). Ordinarily we do not consider arguments raised for the first time in a reply brief, and we find no reason to depart from that rule in this case. *See A Helping Hand LLC v. Balt. County*, 515 F.3d 356, 369 (4th Cir. 2008).

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES
SECURITIES AND
EXCHANGE
COMMISSION

Plaintiff

CIVIL ACTION NO.
MJG-03-1042

vs.

AGORA, INC., et al.

Defendants

* * * * *

MEMORANDUM OF DECISION

This case was tried before the Court without a jury. The Court has heard the evidence, reviewed the exhibits, considered the materials submitted by the parties and had the benefit of the arguments of counsel. The Court now issues this Memorandum of Decision as its findings of fact and conclusions of law in compliance with Rule 52(a) of the Federal Rules of Civil Procedure.

I. BACKGROUND

A. Defendants

Defendant Agora, Inc. ("Agora") is a Maryland Corporation engaged in the publication and distribution of books, magazines and newsletters. Agora's newsletters address topics ranging from investment and health advice to travel and leisure activities. Pirate Investor, LLC ("Pirate") is a wholly-owned subsidiary of Agora that publishes several investment newsletters. Defendant Frank Porter Stansberry ("Stansberry") is the editor of two of Agora's internet financial newsletters.

There is no doubt that each of the Defendants was engaged in the production and distribution of publications entitled to substantial First Amendment protection. However, as discussed herein, the instant case does not relate to such publications. Rather, the instant case relates to a fraud scheme whereby victims were induced to pay $1,000 each for a "sure thing" stock tip allegedly based upon "inside information" presented separately from Defendants' regular publications.

B. The Scheme

1. Underlying Facts

USEC, Inc. ("USEC") is the world's largest provider of uranium enrichment services. USEC began as an arm of the U.S. government and was privatized in July 1998. As part of a 1993 disarmament pact with Russia called "Megatons to

Megawatts," the U.S. agreed to purchase Russian uranium for use as fuel in commercial nuclear power plants.

USEC and its Russian counterpart, OAO Techsnabexport ("Tenex"), renegotiate the price of uranium periodically. The uranium is purchased in units called separative work units, or "SWUs." New pricing agreements are subject to the approval of the U.S. and Russian governments.

At the end of 2001, an interim pricing agreement between USEC and Tenex expired. In February 2002, USEC and Tenex reached a new pricing agreement, subject to approval by the U.S. and Russian governments. As of May 2, 2002, the United States had not announced approval for the new USEC/Tenex price agreement.

From May 24 to 25, 2002, President Bush and Russian President Vladimir Putin met in Russia for an arms summit. A potential connection between the summit and the approval of the USEC/Tenex price agreement had been raised by USEC in discussions with Bank of America on April 16, 2002.

2. Stansberry's Contact

On May 1, 2002, Stansberry contacted Steven Wingfield, Director of Investor Relations for USEC. Stansberry and Wingfield scheduled a conference call for the following day to discuss USEC's business.

The May 2, 2002, conference call between Stansberry and Wingfield lasted for approximately

one hour. Mary Angeles Major-Sosias ("Major-Sosias"), newly employed as the Manager of Investor Relations for USEC, sat in on the call to learn more about investor relations at USEC. During the call, Major-Sosias took detailed notes.

There was, during the conference call, no communication from Wingfield to Stansberry providing "inside information" regarding USEC. In particular, Wingfield did not tell Stansberry that the USEC/Tenex pricing agreement would be approved on May 22 or tell him to watch the stock on that date.

3. The Super Insider Solicitation

Following the conference call with USEC, on or about May 7, 2002, Stansberry drafted a report regarding USEC (the "Special Report") and a promotional "Super Insider Tip Email" offering the Special Report for sale (the "Super Insider Solicitation"). Both the Special Report and the Super Insider Solicitation were penned under the pseudonym "Jay McDaniel."

The Super Insider Solicitation bore the heading "DOUBLE YOUR MONEY ON MAY 22ND ON THIS SUPER INSIDER TIP." In the Super Insider Solicitation, Pirate offered to sell, for $1,000, the Special Report which it claimed contained "insider" information purportedly obtained from a senior executive at an unnamed company concerning the impending announcement of government approval of a major international agreement. The unnamed company was said to be involved in the nuclear energy field and would earn profit of more than $2.5

billion as a result of an arms treaty between the U.S. and Russia.

The Super Insider Solicitation stated that investors would "make a fortune" because the information was obtained from a senior company executive who was "definitely in a position to know" exactly when the deal between the two countries would be approved. The Super Insider Solicitation also said that investors could "double [their] money on a safe stock in one day" and that Pirate could tell them "exactly which day to buy (May 21st) and sell (May 23rd)." The Super Insider Solicitation encouraged recipients to stake their entire investment portfolios on the tip.

On May 13, 2002 at approximately 6:30 p.m., Stansberry sent the Super Insider Solicitation to the Pirate Blast database, which contained approximately 20,000 e-mail addresses.[1] By the following day, Pirate had sold approximately 107 Special Reports.

From May 14 through May 18, the Super Insider Solicitation was also sent to other lists from Agora financial newsletters and one newsletter not affiliated with Agora. The Super Insider Solicitation was ultimately sent to approximately 800,000 individuals. Pirate sold 1,217 copies of the Special Report. Proceeds from the sale of the Special Report

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[1] Also on May 13, President Bush announced that the U.S. and Russia had reached a new arms reduction agreement.

totaled approximately $1,002,000, of which Stansberry received $200,400.[2]

4. The Special Report

The Special Report disclosed that the unnamed company referred to in the Super Insider Solicitation was USEC. The Special Report stated that "[a] USEC senior executive has assured me that the new Russian. agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said 'watch the stock on May 22.'" Pl.s' Ex. 17.

5. Results

No announcement was made regarding the USEC/Tenex price agreement on May 22, 2002. Indeed, it was not until June 19, 2002 that the State Department and USEC announced the approval of the USEC/Tenex price agreement.

In the five months preceding the May 14, 2002 Super Insider Solicitation, trading volume in USEC common stock averaged approximately 189,000 shares a day at prices ranging from $5.78 to $7.52 a share. From May 14 to May 23, 2002, trading volume in USEC averaged 3.3 million shares a day with a closing price ranging from $7.85 a share on May 14 to

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[2] Pirate's gross receipts from the sale of the Special Report totaled $1,217,000. Pirate refunded a total of $215,000 to 215 purchasers of the Special Report and paid Stansberry a commission of $200,400, leaving Pirate with net receipts of $801,600.

a high of $9.89 a share on May 20, 2002. However, on May 22, 2002, the price of USEC stock fell from $9.54 to $8.20 a share.

On April 18, 2003, the United States Securities and Exchange Commission ("SEC" or "Commission") charged Defendants with securities fraud under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. The SEC seeks an accounting, injunctive relief and civil penalties.

II. DISCUSSION

A. Legal Framework

The Commission has charged that Defendants have violated Section 10(b) of the Securities Exchange Act of 1933 (the "'33 Act") and Commission Rule 10b-5. Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or the mails, or any facility of any national securities exchange . . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange, . . .
>
> Any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or

> appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

Rule 10b-5, promulgated under Section 10(b), states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme or artifice to defraud, or
>
> (b) To make untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

In enacting Section 10(b), Congress intended "to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus achieve a high standard of business ethics in the securities industry." SEC v. Zandford, 535 U.S. 813, 819 (2002). Therefore, the Supreme Court has stated that Section 10(b) should be "construed not technically and restrictively, but flexibly to effectuate its remedial purpose." Id. at 819.

B. Standard of Proof

The Commission bears the burden of proving each element of this civil offense by a preponderance of the evidence. Steadman v. SEC, 450 U.S. 91, 102 (1981); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 355 (1943).

Defendants contend that the Commission must prove that the statements at issue were false by "clear and convincing evidence" because "liability is sought on pure speech activity on a matter of public concern." See Batson v. Shiflett, 602 A.2d 1191, 1210 (Md. 1992). However, Batson involved allegedly defamatory statements made by a union official against a rival in a ongoing, contentious and conspicuously public campaign. Id. at 1195-98. The instant case involves commercial speech.

The level of protection for commercial speech "turns on the nature both of the expression and of the governmental interests served by its regulation." Cent. Hudson v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980). The Defendants' statements at issue, the Super Insider Solicitation and the Special Report,

were purely commercial speech, afforded lesser protection than other forms of expression. See Edge Broad'g Co. v. United States, 5 F.3d 59, 61 (4th Cir. 1992); Levi Strauss & Co. v. Shilon, 121 F.3d 1309, 1312-13 (9th Cir. 1997) (stating that the First Amendment only protects commercial transactions that concern lawful activity). The Court does not find it appropriate to require the Commission to prove the elements of its case by more than a preponderance of the evidence.

Nonetheless, the Court finds that the Commission has, in the instant case, established every element of its charges against Defendants Pirate and Stansberry[3] by clear and convincing evidence.

C. Elements of the Charge

To establish a violation of Section 10(b) and Rule 10b-5, the Commission must prove:

1. That the Defendants made a false statement or omission;

2. Of material fact;

3. With scienter;

4. In connection with the purchase or sale of securities;

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[3] But not against Agora.

5. By using a means or instrumentality of interstate commerce.

McConville v. SEC, 465 F.3d 780, 786 (7th Cir. 2006); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; see SEC v. SBM Inv. Certificates, Inc., DKC-06-0866, slip op. at 26 (D. Md. Feb 23, 2007).

D. Proof of Elements

1. Actionable False Statements

a. The False Statements

To satisfy the first element, the SEC must prove that Defendants made an "untrue statement of material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5. The SEC "must point to a factual statement or omission - that is, one that is demonstrable as being true or false." Ottman v. Hanger Orthopedic Group, Inc., 353 F.3d 338, 342-43 (4th Cir. 2003); Longman v. Food Lion, Inc., 197 F.3d 672, 682 (4th Cir. 1999) (emphasis in original). The Commission must also then prove that the statement was, in fact, false. See Ottman, 353 F.3d at 343.

The Super Insider Solicitation and the Special Report contain numerous statements that were untrue. Some of the untrue statements may not be

actionable.[4] However, the essential fraudulent element - the misrepresentation that the purveyor of the Special Report had a particular inside source for the precise date on which the stock price would rise - is definitely actionable.

The Super Insider Solicitation states that, for $1,000, a customer would be given the identity of a corporate stock that would have a substantial rise in price on a specific date. The Super Insider Solicitation explained that the reason why the tip being sold had particular value was the inside information on which it was based:

> [B]ecause of my source - a senior company executive - I can even tell you EXACTLY WHEN the deal will be finalized and accounted to the public. ... [t]he deal will close on May 22nd, only a few days from now.
>
> * * *
>
> A high-level corporate executive - someone definitely in a position to know - passed along the details to me. . . . [h]e even told me the precise day the deal would be announced.
>
> * * *

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[4] For example, the use of the pseudonym "Jay McDaniel" or even the predictive nature of some statements.

> I can even tell you exactly which day the pop in the stock should happen. Like I told you, it's a Wednesday later this month - May 22nd.
>
> * * *
>
> I can tell you precisely when. . . . I can even tell you exactly which day to buy (May 21st) and sell (May 23rd).

Pl.'s Ex. 1.

Some 1,217 customers were persuaded by the Super Insider Solicitation to buy the Special Report, paying a total of more than $1,000,000 to be advised that it was a senior executive of USEC who had provided the inside information on which the customers could rely to buy USEC stock on May 21 and sell at a profit on May 23.

Both the Super Insider Solicitation and the Special Report included the actionable false statement that a senior executive of a company (identified in the Special Report as USEC) had told the author of the May 22 date on which the contract would be approved and, therefore, the stock price would rise. The critical statement is not categorizable as "puffery"[5] or a prediction of a future event but

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[5] Puffery involves "forward-looking statements, or . . . generalized statements of optimism that are not capable of objective verification." Grossman v. Novell, Inc., 120 F.3d 1112, 1123 (10th Cir. 1997). Similar to statements of "soft information," "puffery" is generally nonactionable because

rather is the false statement of an alleged existing fact - that is, the asserted past receipt of inside information from a senior USEC executive who was in a position to know when the pricing agreement would be approved. Nor are the actionable false statements in the instant case merely opinion.[6] The Court finds that the SEC has established that the Super Insider Solicitation and the Special Report include actionable false statements - to the effect that the author was basing his statement as to a May 22,

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reasonable persons do not rely on such assertions in making investment decisions. Raab v. Gen. Physics Corp., 4 F.3d 286, 289-90 (4th Cir. 1993); see also Zerman v. Ball, 735 F.2d 15, 21 (2d Cir. 1984) (finding nonactionable a statement that a bond is "marvelous"); Rotstein v. Reynolds & Co., 359 F. Supp. 109, 113 (N.D. Ill. 1973) (finding a statement that a stock is so "red hot" that the investor "could not lose" to be puffery).

[6] In Biospherics, Inc. v. Forbes, Inc., the Fourth Circuit held that statements in a Forbes investment column that a certain company's stock would "sour" and that "hype and hope" had driven up its share price were not actionable, stating:

> any reasonable person reading [the article] would recognize, based on the tenor, language, and context of the article, that the challenged statements constitute a subjective view, not a factual statement. When a speaker plainly expresses "a subjective view, an interpretation, a theory, conjecture or surmise, rather than [a] claim[ ] to be in possession of objectively verifiable [false] facts, the statement is not actionable."

151 F.3d 180, 182 (4th Cir 1998) quoting Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993).

2002 rise in stock price upon statements made to him by a senior executive of USEC in a position to know when the price agreement would be approved.[7]

The Court does not find credible Stansberry's testimony that in the May 2, 2002 conference call, Wingfield provided him with information that there would be an announcement of approval of the USEC pricing agreement on May 22, 2002 or any other particular date. Nor was there any statement from Wingfield indicating that Stansberry should "watch the stock on May 22" or anything of the sort.

The Court finds credible the testimony of Wingfield and Major-Sosias regarding the May 2, 2002 telephone conference with Stansberry. As related in Wingfield's notes of the May 2, 2002 conference call:[8]

> I told Stansberry that we were working closely with the government and, as stated on the conference call, expected the agreement to be approved by the government in the near term. In

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[7] The Court is not holding that a sale of inside information is per se illegal or fraudulent. The Court's holding is not dependent upon a finding that the alleged information from Wingfield - if it had been provided - would have been "inside information." Rather the actionable fraud was the statement of the source of the information sold to have been a corporate executive in a position to know, when there was no such source.

[8] Memorialized on May 14, 2002.

> response to questions about the Bush and Putin summit meeting in May, I said that we hoped something positive about our deal would come out of that meeting. I told him to check back with us after that meeting.

Trial Tr. 65, Mar. 21, 2005.

The Court finds no basis to believe, as Stansberry asserts, that Wingfield, USEC's Director of Investor Relations, would tell a newsletter writer nonpublic inside information that could expose Wingfield and USEC to personal and corporate liability.[9]

In sum, the Court finds that the SEC has established that the Super Insider Solicitation and Special Report contain the actionable false statement that a USEC executive (Wingfield) had told the author that the stock price would rise on May 22, 2002.

b. Stansberry and Pirate Made the False Statements

Of course, the SEC has proven that Stansberry made all of the statements in the Super Insider Solicitation and the Special Report inasmuch as he

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[9] The Court finds preposterous Stansberry's statement that Wingfield became angry during the May 2, 2002 conference call when Stansberry indicated that he was not going to write about USEC in his newsletter and acted upon his anger by providing inside information.

has admitted that he, using the pseudonym Jay McDaniel, was the author of the communications.

Pirate also made the statements at issue. The Super Insider Solicitation was sent to a Pirate distribution list and contained a link where a recipient could purchase the Special Report from Pirate. Pl.s' Ex. 1. The Special Report included a copyright claim by Pirate. Pl.s' Ex. 17. Moreover, the pseudonym "Jay McDaniel" is frequently used by Pirate writer Jody Madron and was, with Pirate's consent, used by Stansberry to make the statements at issue. Furthermore, Stansberry testified that with regard to Pirate: "there's no doubt about it, I run the show." Trial Tr. 169, Mar. 22, 2005.

The SEC has not proven that Agora - as distinct from its subsidiary Pirate - made the statement at issue. In the instant case, the SEC asserts liability against Agora only on the basis that it could be found to have made the statement itself. See Stipulated Facts, Joint Proposed Pre-Trial Order [Document 76] at 13, ¶ 2. Accordingly, Agora is not liable for the charge at issue.

Neither the Super Insider Solicitation nor the Special Report contained any indication that it was sent by Agora or that Agora (as distinct from its subsidiary) was adopting or expressing a belief as to the truth of the statements therein.

The Commission asserts that Agora is liable for the statements made because its legal counsel reviewed the Super Insider Solicitation and the Special Report, but did not independently fact-check

it. However, Agora's legal counsel was also legal counsel for Pirate. Trial Tr. 208-09, Mar. 22, 2005. Thus, the Court does not find that counsel, while doing his review, was acting for Agora as distinct from Pirate.

Moreover, even if the attorney had been acting for Agora as well as Pirate, that would not establish that Agora made the false statements in the communications. See Great Neck Capital Appreciation Inv. P'ship v. PricewaterhouseCoopers, L.L.P., 137 F. Supp. 2d 1114, 1121 (E.D. Wis. 2001) (auditor who reviewed press release and advised that it conformed to Generally Accepted Accounting Principles not liable under §10(b) as a primary violator for misstatements in the press release because there was no allegation that auditor drafted the release, publicly adopted it or allowed its name to be associated with it).

The Court does not accept the SEC's contention - if it is being pressed - that Agora is to be considered to have made the statements in the Super Insider Solicitation and Special Report by virtue of its ownership and ability to control Pirate. The Court does not find that Agora itself made the false statements at issue.

2. Materiality

It is not sufficient for liability under Section 10(b) or Rule 10b-5 that Defendants made a false statement of fact; the fact must have been material. A fact is material if a substantial likelihood exists "that disclosure of the omitted fact [or statement of

the untrue fact] would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). In assessing materiality, the Court must consider the allegedly false statement within the context of the other information that was publicly available to reasonable investors at the time the alleged false statement was made. See Phillips v. LCI Int'l, Inc., 190 F.3d 609, 617 (4th Cir. 1999).

There must be a "substantial likelihood that a reasonable purchaser or seller of a security (1) would consider the fact important in deciding whether to buy or sell the security or (2) would have viewed the total mix of information available to be significantly altered by disclosure of the fact. Ottman, 353 F.3d at 343 (internal citations omitted). The Court need not find that the fact would alter an investor's decision to purchase or sell the security; the Court need only find that a reasonable investor would consider the information to be important. Folger Adam Co. v. PMI Indus., Inc., 938 F.2d 1529, 1535 (2d Cir.); SEC v. Nat'l Student Marketing Corp., 457 F. Supp. 682, 709 (D.D.C. 1978). In the instant case, the SEC has proven that the actionable false statement was material.

The actionable falsity in the instant case is the lie that "Jay McDaniel" had been told by a USEC executive that government approval of the pricing agreement would be announced on May 22, 2002. The materiality of this statement is self-evident and also supported by specific evidence. The essence of the

false information is not only that the highly beneficial pricing agreement would be announced on May 22, 2002, and that the date had been communicated by a senior USEC executive, but also that the market in general does not know what purchasers of the Special Report will learn for their $1,000. As touted by the Super Insider Solicitation, access to this not-widely-known information will give tipees the opportunity to buy a stock that will "skyrocket."

Furthermore, the SEC has presented the testimony of investors that they felt that tip was important, in particular, because it allegedly came from a senior USEC executive. See Trial Tr. 7, Mar. 24, 2005 (investor Roger Listwan testifying that it was important to him that the Super Insider Solicitation said that a senior company executive had said to watch the stock and that the pricing agreement would be announced on May 22, 2002); id. at 24-26 (testimony of investor David Todd Cheatham that the specific date and alleged source of the information in the Super Insider Solicitation was important in his decision to invest in USEC).

Moreover, many individuals who purchased the USEC report later requested refunds from the Defendants. These individuals also complained about the lack of an announcement from USEC on May 22, 2002 or the denials by USEC of the claims in Defendants' Super Insider Solicitation or the USEC Special Report. See Pl.'s Ex. 49.

In addition to the investors who requested refunds, many investors posted negative sentiments

about the lack of a May 22 announcement on Defendants' message boards. See Pl.s' Ex. 58, 59, 61, 65, 66. Pirate had never had so many complaints about a report prior to the USEC Special Report. Trial Tr. 31, Mar. 29, 2005 (testimony of Elyssa Yankelov, customer service for Pirate). Customers complained about the false information and the use of a pen name in the Special Report and theorized that it was just part of a fraudulent scheme, among other things. Id. at 32-34. Employees of USEC received phone calls from individuals who had purchased the USEC Special Report and demanded to know when the pricing agreement announcement was coming. Trial Tr. 100, 103, Mar. 21, 2005; Trial Tr. 31, Mar. 22, 2005. Wingfield testified that callers were angry that USEC had not made the promised announcement. Trial Tr. 90, Mar 21, 2005.

Market data contemporaneous with the statements also confirms the materiality of the false statements. On May 13, 2002, the day before the Super Insider Solicitation, the trading volume of USEC's stock was 49,900 shares, and the average volume of the previous 30 days was 127,080 shares. See Pl.'s Ex. 170. On May 14, before the markets closed, President Bush announced that an arms control deal would be signed with Russia in the near future.[10] Though USEC did not make an

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[10] Defendants argue that it was President Bush's speech that caused the jump in price and volume on May 14, and in that assertion they are correct. The President's speech was in the middle of the day, leading to market reaction by at least 3:30 p.m. The Super Insider Solicitation was not disseminated

announcement on its perception of the deal's effect on the price of Uranium, USEC's stock volume jumped to 1,446,600, an increase of 1,396,700 shares over the previous day's trading volume. After the markets closed that evening, Stansberry and Pirate sent the Super Insider Solicitation. The next day, May 15, trading volume in USEC jumped even more dramatically, up to 4,765,600 shares, an increase of 3,319,000 shares. The volume continued to increase after May 14, peaking at 6,053,000 shares on May 21, the day that the Super Insider Solicitation had identified for investors to purchase USEC's stock. See id. The May 21 volume was ten times larger than the 30-day average volume of 673,773 shares and more than two million shares greater than the previous day. After May 21, when the May 22 approval of the pricing agreement did not take place, trading in the stock decreased steadily over the next few days. See id. On May 22, trading volume in USEC dropped by 3,677,600 shares, and on May 23, the volume dropped by another 1,137,400 shares.

The price of USEC's stock had made an ascent, from $7.85 on May 14 (the day the Super Insider Solicitation came out after hours) to $8.95 on May 15, the first trading day after the Super Insider Solicitation. The price continued to climb, reaching

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until 6:30 p.m., after U.S. markets were closed. However, the increased jump in price and volume the next day cannot be ascribed fully to the President's speech that did not directly pertain to USEC, in contrast to Defendants' false statements that related specifically to USEC.

$9.54 on May 21. On May 22, the share price abruptly dropped by $1.34 per share.

The sudden and drastic increase in trading, beginning the first trading day after the Super Insider Solicitation, and climaxing on the date the Super Insider Solicitation and Special Report instructed tipees to purchase USEC's stock, confirms that the market found May 21 to be a significant buy date for USEC. Defendants have presented no evidence that any other newsletter writer, journalist or investment advisor had pegged May 21 as an important buy day for USEC.

Defendants argue that their statements have not "altered the mix" of information because it is not "substantially likely" that a reasonable investor would believe that disclosure of the untrue fact and nothing but the untrue fact would "alter the 'total mix' of information available." Phillips v. LCI, Int'l, Inc., 190 F.3d 609, 619 (4th. Cir 1999); Defs.' Tr. Brief [Document 100] at 14 (arguing that "[t]he evidence in the record simply does not support the SEC's theory that it was the USEC report that altered the mix of information in the stock market on or about May 14, 2002.").

Defendants seek to paint a picture of a market with positive information about USEC and speculation as to whether and when it will agree to a new contract that will provide USEC with additional profitability and return to shareholders. However, the Super Insider Solicitation and Special Report altered the mix of information. These communications falsely represented that tipees

would receive not generally known information as to the specific day on which the generally anticipated good corporate news would be made public based upon a particularly reliable alleged source. The mix of information made available to the buying tipees - who paid $1,000 to get the false information - most certainly altered the mix of information available to them.

The Court well recognizes that statements as to future events are nonactionable under Rule 10b-5 if accompanied by "detailed and meaningful cautionary language tailored to the specific risks" that sufficiently "bespeaks caution" to the reasonable investor. Raab v. Gen. Physics Corp., 4 F.3d 286, 290 (4th Cir. 1993). Such statements of opinion, predictions, forecasts, projections, and other subjective analysis or extrapolation constitute "soft information" and are generally nonactionable because reasonable investors and market observers typically discount or disregard such statements. Id.; In re Verifone Sec. Litig., 784 F. Supp. 1471, 1482 (N.D. Cal. 1992), aff'd, 11 F.3d 865 (9th Cir. 1993) (observing that investors know the "inaccuracy inherent in forecasting"). The "bespeaks caution" doctrine has been employed by various courts to dismiss claims of securities fraud if cautionary language sufficiently negates the materiality of the alleged misrepresentations or omissions. Gasner v. Board of Sup'rs, 103 F.3d 351, 358 (4th Cir. 1996); In re Donald J. Trump Casino Sec. Lit., 7 F.3d 357, 371 (3d Cir. 1993), cert. denied sub nom Gollomp v. Trump, 510 U.S. 1178, (1994); see also Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1040 (6th Cir.

1991); I. Meyer Pincus & Assocs. v. Oppenheimer & Co., 936 F.2d 759, 763 (2d Cir. 1991); Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 (1st Cir. 1991); Luce v. Edelstein, 802 F.2d 49, 56 (2d Cir. 1986); Polin v. Constructron Corp., 552 F.2d 797, 806 n.28 (8th Cir. 1977), cert. denied, 434 U.S. 857, (1977).

Predictions and general expressions of opinion about future events are not actionable under Section 10(b) and Rule 10b-5 if (i) the speaker truly believes the statement, (ii) there is a reasonable basis for the belief, and (iii) the speaker is not aware of any undisclosed facts that would seriously undermine the accuracy of the statement. In re Apple Computer Sec. Litig., 886 F.2d 1109, 1113 (9th Cir. 1989); see also Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1093-94 (1991).

Defendants attempt to categorize the language in the Super Insider Solicitation and Special Report as cautionary. However, they point to no "detailed and meaningful cautionary language tailored to the specific risks" of investing in USEC on the basis of Defendants' representation that they had been informed by a senior USEC executive that the pricing agreement would be announced on May 22. See Raab, 4 F.3d at 290. To the contrary, Defendants' false statements are precise, with no warnings or articulation of the dangers or uncertainties of investing in this stock based on the information presented. The first three paragraphs in Defendants' Super Insider Solicitation set the tone:

> I've recently learned the details of a major international agreement between the United States and Russia that will create more than $2.5 billion for one small U.S. company.
>
> Investors in this company are going to make a fortune - for reasons that I can detail for you here. And, best of all, because of my source - a senior company executive - I can even tell you EXACTLY WHEN the deal will be finalized and announced to the public.
>
> The deal will close on May 22nd, only a few days from now.

Pl.'s Ex. 1 (capitalization in original).

No cautionary language accompanies the false statements in the Super Insider Solicitation or the Special Report. See id. Furthermore, the Court finds that Defendants' false statements were made knowingly. The "bespeaks caution" defense is not available for the defense.

3. Scienter

Scienter is a state of mind embracing intent to deceive, manipulate or defraud. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976); Svezzese v. Duratek, Inc., No. 02-1587, slip op. at 4 (4th Cir. June 12, 2003). It requires a showing that defendant acted "other than in good faith," Hochfelder, 425 U.S. at 206, or that the defendant "lacked a 'genuine belief

that the information disclosed was accurate and complete in all material respects.'" In re Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1244 (3d Cir. 1989) (citation omitted).

Defendant Stansberry did not have, indeed, could not possibly have had a belief that the information he provided in the Super Insider Solicitation and Special Report was correct in all material respects. In particular, Stansberry knew full well that Wingfield had not told him that the pricing agreement would be announced on May 22. Furthermore, Stansberry intentionally made false statements about the company (USEC) to induce the recipients of the Super Insider Solicitation to pay $1,000 for the Special Report that completed the intentionally false statements. See Spier v. Erber, 759 F. Supp. 1024, 1030 (S.D.N.Y. 1991) (finding that defendant "knew that [their] representations were false, and intentionally made such false representations in order to induce" plaintiff to take an action gave rise to the "strong inference of scienter") (internal citations omitted).

The Court finds that Stansberry's scienter is imputed to Pirate because he effectively controlled Pirate and made the statements at issue on behalf of Pirate as an agent of Pirate, within the scope of his agency.

Even if Stansberry's scienter were not imputed to Pirate, the SEC has proven Pirate's scienter nonetheless. A statement may be actionable if it is made with "reckless disregard for its truth or falsity." Eisenberg v. Gagnon, 766 F.2d 770, 776 (3d Cir.

1985) (citations omitted). "The securities laws generally define recklessness as an act 'so highly unreasonable and such an extreme departure from the standard of ordinary care as to present a danger of misleading the plaintiff to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Phillips, 190 F.3d at 621.

The evidence established that Pirate acted with "reckless disregard for [the] truth or falsity" of the statements. Eisenberg, 766 F.2d at 776. George Rayburn testified that it was Pirate's usual practice to have an editor review and confirm the accuracy of the content of all editorial publications. Trial Tr. 5, Mar. 29, 2005 However, that procedure was not followed in regard to the Super Insider Solicitation and Special Report because Stansberry was both author and editor. As a result, there was no independent verification of the facts in the Super Insider Solicitation or the Special Report. Id.

Simply allowing one person to author, edit, and publish information without editorial or other review to authenticate its claims eviscerates the editing procedures of Pirate and evidence a reckless disregard for the truth of the statement. Furthermore, the nature of the bombastic claims in the Super Insider Solicitation and the Special Report should have caused a reasonable editor or manager at Pirate to inquire about the source. After all, Stansberry was claiming to have inside information from a USEC senior executive and was telling customers to buy and sell on specific days. Any

reasonable editor or manager would have realized the potential legal and financial exposure to Pirate should that information have been incorrect, or as it turned out, fabricated. Abdicating all editorial authority to the proponent of such a statement evidences a reckless disregard for the truth by Pirate.

Accordingly, even if Stansberry's statements were not attributable to Pirate, the Court would find Pirate to have acted with scienter in regard to the false statements at issue.

4. In Connection With the Purchase or Sale of a Security

A fraudulent action is "in connection with" the sale of a security when someone utilizes a device "that would cause reasonable investors to rely thereon" and "so relying, cause them to purchase or sell a corporation's securities." In re Carter-Wallace, Inc. Sec. Litig., 150 F.3d 153, 156 (2d Cir. 1998) (citation omitted); SEC v. Savoy Indus., 587 F.2d 1149, 1171 (D.C. Cir. 1978) (the "in connection with" requirement is satisfied when it "may reasonably be expected that a publicly disseminated document will cause reasonable investors to buy or sell securities in reliance thereon, regardless of the motive or existence of contemporaneous transactions by or on behalf of the violator").

This element of Section 10(b) and Rule 10b-5 is to be construed broadly and flexibly to effectuate its remedial purpose. SEC v. Zandford, 535 U.S. 813, 819 (2002). Section 10(b) and Rule 10b-5 are flexible enough to encompass many varieties of fraudulent

schemes, not simply the "garden type variety of fraud." 742 F.2d 592, 596 (11th Cir. 1984). Defendants need not have a fiduciary responsibility to the recipients of the false statements; it is enough if Defendants' actions affected the price of the stock or induced others to purchase the stock. See United Int'l Holdings, Inc. v. The Wharf (Holdings) Ltd., 210 F.3d 1207, 1221 (10th Cir. 2000) (finding the "in connection with" requirement satisfied where a defendant used knowingly false statements to induce another to purchase a security); In re Cascade Int'l Sec. Litig., 894 F. Supp. 437, 444 (S.D. Fl. 1995) (stating that the "in connection with" requirement can be met if the plaintiff alleges that the statements of defendant affected the price of the stock); SEC v. Terry's Tips, Inc., 409 F. Supp. 2d 526, 533 (D. Vt. 2006) (finding that a newsletter publisher who deceived customers through promises of unreasonable returns if they invested in the market could satisfy the "in connection with" requirement).

Defendants argue that "[n]o court has ever imposed liability under Section 10(b) and Rule 10b-5 based on nothing more than commentary or predictions concerning recommended stocks." Defs.' Trial Br. [Document 93] at 3 (emphasis in original). Even if accurately stated, this prohibition would not render the false statements at issue immune from Rule 10b-5. The Super Insider Solicitation and Special Report did more, significantly more, than provide a commentary or prediction. These documents provided the false statement that purchasers of the Special Report would obtain information not generally available from USEC as to

the precise date on which a specific event would cause the corporate stock to "skyrocket."

Defendants further argue that should they be held liable, the government and private litigants would be free to file Section 10(b) or Rule 10b-5 actions against "any and all publishers of financial information." Id. However, the statements at issue were not made in a "publication" of the type accorded special protection from suit. In this case, Stansberry and Pirate - although they may have been otherwise engaged in producing publications entitled to heightened protection - were not so engaged in regard to the fraudulent scheme at issue.

The defense also urges the Court to conclude that Carter-Wallace stands for the proposition that a defendant must have a fiduciary duty to those to whom it speaks to be held liable for securities fraud. Defs.' Trial Br. [Document 98] at 5. The Court does not read Carter-Wallace to so hold.

The very essence of the fraudulent scheme was to induce its victims to purchase USEC stock prior to May 22, 2002 and, of course, to pay some $1,000 for the privilege of being misled to believe that there was a particular plausible specific reason to do so. The Court concludes that the SEC has proven that the false statements at issue were made in connection with the purchase or sale of a security.

5. Use of an Instrumentality of Interstate Commerce

To establish a violation of Section 10(b) and Rule 10b-5, the SEC had to prove that Defendants used "any means or instrumentality of interstate commerce" to engage in the fraudulent conduct. 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5; SEC v. Solucorp Indus., Ltd., 274 F. Supp. 2d 379, 418-19 (S.D.N.Y. 2003).

There is no doubt as to the interstate commerce nexus of the scheme at issue here. The Super Insider Solicitation was sent by email, undoubtedly an instrumentality of interstate commerce. United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997); see United States v. Thomas, 74 F.3d 701, 706-09 (6th Cir. 1996).

E. Asserted Defenses

1. Proof of Malice Not Required

Defendants argue that the false statements at issue were made in the course of a "pure speech activity," so that they cannot be liable for a violation of Rule 10b-5 unless there is clear and convincing proof of actual malice.

In New York Times v. Sullivan, the Supreme Court considered the affirmation by the Alabama Supreme Court of a jury verdict finding the New York Times liable for libel per se because of a private advertisement in the Times that contained false statements about a public official, one of the City

Commissioners of Montgomery, Alabama. 376 U.S. 254, 262-64 (1964).

The United States Supreme Court reversed on the basis that the "rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct." Id. Under the proper safeguards, the Court continued, "the evidence presented in this case is constitutionally insufficient to support the judgment for respondent." Id. at 265.

The Supreme Court noted that although the statement in question had been published in a paid space in the Times, "[i]t communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." Id. at 266. To hold otherwise, the Supreme Court noted, would discourage newspapers from carrying "editorial advertisements" and "shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities - who wish to exercise their freedom of speech even though they are not members of the press." Id. With regard to the commercial nature of the statements, the Court held that "allegedly libelous statements [which] would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection

because they were published in the form of a paid advertisement." Id. After a lengthy discussion of the importance of free discussion of political ideas, the Supreme Court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80.

Defendants assert that their statements are "pure speech" in the same character as the political speech at issue in Sullivan. This Court disagrees.

The Super Insider Solicitation and Special Report are commercial speech entitled to lesser protection under the First Amendment than the pure speech involved in Sullivan. The Super Insider Solicitation to purchase the Special Report was a communication with no purpose other than to "propos[e] a commercial transaction." Cent. Hudson v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980).

"The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." Id. at 563. The government may "ban forms of communication more likely to

deceive the public than to inform it." Id.; see Va. State Bd. of Pharmacy v. Va. Consumer Council, 425 U.S. 748, 771 (1976) (stating that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake"); Nat'l Life Ins. v. Philips Publ'g, 793 F. Supp. 627, 646 (D. Md. 1992) (stating that in order to receive First Amendment protection, commercial speech "must be neither misleading nor related to unlawful activity.") (citing Cent. Hudson, 447 U.S. at 654). Specifically, the government may regulate communications with regard to the "exchange of information about securities" without offending the First Amendment. Ohralik v. Ohio State Bar, 436 U.S. 447, 453-54 (1978) (citing SEC v. Tex. Gulf Sulfur Co., 401 F.2d 833 (2d. Cir. 1968)). This is because communications concerning the sale and purchase of securities form "a distinct category of communications in which the government's power to regulate is at least as broad as with respect to the general rubric of commercial speech." SEC v. Wall Street Publ'g, 851 F.2d 365,. 373 (D.C. Cir. 1988).

Most importantly, "the First Amendment does not shield fraud." Illinois v. Telemarketing Assoc., 538 U.S. 600, 612 (2003). The government's power to protect the people from fraud is "firmly established." Id. The intentional lie is "no essential part of any exposition of ideas" Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); see Telemarketing Assoc., 538 U.S. at 612.

Defendants do not challenge the ability of Congress to enact Section 10(b) or the Commission to promulgate Rule 10b-5, but rather seek to color their

statements with the hue of political discourse, as in Sullivan. However, the communications at issue are not pure speech and the SEC does not bear the burden of proving actual malice in Defendants' statements by clear and convincing evidence, as was necessary on the facts in Sullivan.

The communications at issue were not within publications addressing matters of political, social or intellectual interest. The Super Insider Solicitation was a fraudulent commercial solicitation to purchase a product. The Court does not find such a communication entitled to the First Amendment protection provided by Sullivan.

The SEC has proven scienter on the part of Stansberry and Pirate. It was not required to prove malice.

2. The "Disinterested Publisher" Defense

In actions brought under the Investment Adviser Act of 1940 ("Advisers Act"), there is a defense available for "the publisher of [a] bona fide newspaper, news magazine or business or financial publication of general and regular circulation." 15 U.S.C. § 80b-2(a) (11) (D) (2003); Lowe v. SEC, 472 U.S. 181, 204 (1985). There is an unresolved question of whether the "disinterested publisher" defense would be available in a Section 10(b) or Rule 10b-5 charge.

A judge of the District Court for the District of Columbia has held that the "disinterested publisher"

defense is applicable to Section 10(b) or Rule 10b-5 actions. In SEC v. Wall St. Publ. Inst., Inc., 591 F. Supp. 1070 (D.D.C. 1984), the SEC brought a civil action against the publisher of Stock Market Magazine, alleging violations of the Advisers Act and sections 17(b) and 10(b) of the Exchange Act. The district court initially held for the SEC, finding that because the magazine's statements were false and misleading, the "in connection with" element was met.

During the pendency of the defense's appeal, the Supreme Court decided Lowe v. SEC, which, as discussed above, recognized a "disinterested publisher" defense in a case involving the Exchange Act. 472 U.S. 181 (1985). The District of Columbia Circuit remanded Wall Street for further proceedings in light of Lowe. On remand, the Wall Street district court reversed its position and held that the representations made in the publication in question were not "in connection with the purchase or sale of a security" because the actionable statements were made in a bona fide publication with general and regular circulation. SEC v. Wall St. Publ. Inst., Inc., 664 F. Supp. 554 (D.D.C. 1986).

Although the SEC appealed from the second Wall Street district court decision, it did not present an issue as to the dismissal of the Rule 10b-5 claim on appeal. SEC v. Wall St. Publ. Inst., Inc., 851 F.2d 365, 368 (D.C. Cir. 1988).

Therefore, there is no appellate decision with regard to a "disinterested publisher" defense in a Rule 10b-5 case. Hence, a question of first impression

would be presented if Stansberry and Pirate were "disinterested publishers."

In order for Stansberry and Pirate to be "disinterested publishers" of the publications at issue (the Super Insider Solicitation and Special Report), two conditions must be met: (1) the publication must be "bona fide," and (2) it must be "of regular and general circulation." Lowe, 472 U.S. at 206. These "two qualifications precisely differentiate 'hit and run tipsters' and 'touts' from genuine publishers." Id. The focus is on the nature of the publication, and not the general character of the publisher. Id. at 208.

A bona fide publication is one that contains disinterested commentary and analysis as opposed to promotional material disseminated by a "tout." Id. at 206. Of course, the "mere fact that a publication contains advice and comment about specific securities does not give it the personalized character that identifies a professional investment adviser." Id. at 208.

A publication with a "general and regular" circulation is one that is offered to the general public on a regular schedule. Id. at 206. Stated in the converse, publishing a newsletter of "general and regular" circulation does not include the issuance of "bulletins from time to time on the advisability of buying and selling stocks . . . or 'hit and run tipsters.'" Id. (citation omitted).

In Lowe, the Court described the publication before it as "a public forum in which typically anyone may express his views." Id. The "bona fide"

requirement can best be translated as "genuine." Id. at 209. With regard to the specific publication, the Lowe Court noted that "there is no suggestion that [the publication] contained any false or misleading information . . . . [or] that they have been timed to specific market activity, or to events affecting or having the ability to affect the securities industry." Id. The Lowe Court was convinced that "[t]o the extent that the chart service contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt of the protected character." Id. at 209-10.

As to the communications at issue, Stansberry and Pirate are not "disinterested publishers" because the Super Insider Solicitation and Special Report are not "of regular and general circulation." The Special Report was not, by any standard, "of general and regular circulation." The Special Report was only provided to the recipients of the Super Insider Solicitation who paid $1,000 to get the name of the company stock touted in the Super Insider Solicitation.

The defense contends that the Super Insider Solicitation was part of a series called "The Blast," which had been sent on an almost daily basis since February 2000. Even if the Super Insider Solicitation had been part of a semi-regular series of email circulations, if those other emails were of the same character, the frequency of issuance would not make them publications of general and regular circulation. At most, the series would be akin to regular mailings

from a retailer sending alerts of sales and special deals to potential customers.

Finally, it must be noted that in the scheme at issue, the Super Insider Solicitation had no value without the Special Report. That is, after all, why the Super Insider Solicitation was distributed to hundreds of thousands of recipients for free. It was only upon payment of $1,000 and receipt of the by no means generally available Special Report, that the message was delivered - that is that it was a USEC employee, in a position to know who had provided the precise date on which the corporate stock price would "skyrocket."

Accordingly, Stansberry and Pirate would not be entitled to the "disinterested publisher" defense even if it were available in a Rule 10b-5 case.

3. USEC's Failure to Correct False Rumors

According to Defendants, USEC "has affirmative duties imposed upon it by the NYSE to correct false rumors about the corporation that cause unusual market activity. Def.s' Trial Br. [Document 94] at 1. Defendants assert that the New York Stock Exchange, on which USEC is listed, requires listed companies to correct false rumors in the marketplace. The NYSE's Listed Company Manual states that:

> The market activity of a company's securities should be closely watched at a time when consideration is being given to significant corporate matters. If

> rumors or unusual market activity indicate that information on impending developments has leaked out, a frank and explicit announcement is clearly required. If rumors are in fact false or inaccurate, they should be promptly denied or clarified.

NYSE Rule 202.03. Even if USEC did have a duty to correct the rumor[11] and breached that duty, Defendants would not be absolved of liability. Defendants made false statements that influenced tipees' decisions to purchase the stock of USEC.

Defendants also argue that USEC's failure to correct the rumor is evidence that Stansberry's statement was, in fact, true. Such "evidence" - if it is evidence at all - would be, in any event, nonpersuasive.

F. Remedial Action

1. Injunctive Relief

The Commission has requested that the Court enter an injunction, pursuant to Federal Rule of Civil Procedure 65(d), enjoining Defendants from violating Section 10(b) or Rule 10b-5 in the future. Where a violation of securities law has been found, a court is vested with broad discretion in deciding whether to

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[11] The Court by no means so holds.

grant injunctive relief. SEC v. Am. Realty Trust, 429 F. Supp. 1148, 1175 (E.D. Va. 1977)

Defendants attempt to avoid an injunction by characterizing it as an unconstitutional prior restraint of speech. While Defendants are correct that there is a "heavy presumption" against the constitutional validity of a restraint of communication, such a presumption does not apply when a Court enjoins activity not protected by the First Amendment. See Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). The Commission does not seek to enjoin Defendants from engaging in protected speech, but from engaging in fraud in commercial speech, an activity that is not protected by the First Amendment. See Telemarketing Assoc., 538 U.S. at 612.

Defendants contend that Courts have "routinely rejected" injunctive relief when faced with instances of similar or even more egregious conduct. Def.s' Trial Br. [Document 106] at 5. The Court does not find there to have been any such "routine" rejection or even that the decisions referred to by the defense are particularly pertinent to the instant case. E.g. SEC v. Sargent, 329 F.3d 34, 39 (1st Cir. 2003) (consultant gave inside information to his dentist); SEC v. Ingram, 694 F. Supp. 1437, 1442 (C.D. Cal. 1988) ("genuinely contrite and repentant" defendant with small financial gain and evidence of scienter, though sufficient to sustain the violation, not overwhelming); SEC v. Yun, 148 F. Supp. 2d 1287, 1294 (M.D. Fla. 2001) (defendant was contrite and would no longer have access to insider information).

In stark contrast, Stansberry and Pirate made substantial profit, scienter has been overwhelmingly established, and there would be ample future opportunities for Stansberry and Pirate to engage in fraudulent schemes of the type established herein. Nor is there any evidence of contrition.[12]

In order to obtain the requested injunction, the SEC must establish a "reasonable and substantial likelihood" that the Defendants will violate securities laws in the future. SEC v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984); SEC v. Fehn, 97 F.3d 1276, 1295 (9th Cir. 1996). In ascertaining the likelihood of future violations, no single factor is determinative; the Court should look at "the totality of the circumstances and factors suggesting that the infraction might not have been an isolated occurrence." Fehn, 97 F.3d at 1295-96; Youmans, 729 F.2d at 415. The Court should consider the:

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[12] Indeed, on June 18, 2002, Jody Madron (a writer for Pirate) emailed Stansberry that he overheard a man in an airport line discussing USEC, saying:

> Yeah, but I don't know if the price will go up because a bunch of Internet assholes drove it up a few weeks ago before everything could fall into place . . . some idiot named McDaniel . . . yeah, I saved all of the emails . . . bunch of assholes who shouldn't be shooting their mouths off.

Pl.'s Ex. 62. In response to Madron's e-mail, Stansberry wrote: Bro . . . . that's fucking unbelievable. I would have walked right up to the guy and said, yep, that was me and then laughed in his face. Id. (punctuation in original).

1. Gravity of the harm caused by the offense;

2. Extent of the defendant's participation and his degree of scienter;

3. Isolated or recurrent nature of the infraction;

4. Likelihood that the defendant's customary business activities might again involve him in such transactions;

5. Defendant's recognition of his own culpability; and Sincerity of his assurances against future violations.

Fehn, 97 F.3d at 1295-96; Youmans, 729 F.2d at 415; SEC v. Suter, 732 F.2d 1294, 1301 (7th Cir. 1984); see SEC v. Holschuh, 694, F.2d 130, 144 (7th Cir. 1982); SEC v. Zale Corp., 605 F.2d 718, 720 (5th Cir. 1981). Because "an injunction is a drastic remedy and not a mild prophylactic," the SEC must meet a high burden to obtain an injunction. Aaron v. SEC, 446 U.S. 680, 703 (1980) (Burger, C.J., concurring).

a. The Gravity of the Harm

The gravity of the harm in this case is not limited to the amount of money each purchaser spent for the Special Report. Approximately 1,217 investors bought the Special Report with the expectation, as promised by the Super Insider Solicitation, that they would double their investment dollars if they just

followed the "insider" information contained within the Special Report.

At least one investor lost approximately 20 to 25% of his investment portfolio after purchasing USEC stock and options between May 13 and 22. See Trial Tr. 8-9, Mar. 24, 2005. That investor finally sold his stock, after May 22 came and went without the anticipated announcement, in August of 2002 when Stansberry indicated in a new special report to investors that USEC stock was no longer a good long-term investment. Id. at 9; see also Pl.'s Ex. 24.[13] The investor lost about $28,000. Trial Tr. 9, Mar. 24, 2005. Although the investor eventually received a refund of the $1,000 Special Report purchase price, that refund was not offered to him by Defendants. Rather, he learned that other purchasers of the Special Report had been offered refunds after reading about the SEC action against Defendants on the Internet. It was then that he contacted Pirate and requested and received a refund of the $1,000 purchase price. Id. at 10.

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[13] To be sure, Stansberry also advised in an August 1, 2002 special report that those who already owned USEC shares should hold them until the end of the year, but cautioned that his recommendation would be to sell any USEC stocks held at the end of the year if certain events did not materialize. Given Stansberry's poor track record on predicting events that would favorably impact USEC's stock, it is not surprising that investors jumped ship after receiving Stansberry's poor long-term prognosis for the stock.

Another investor who purchased the USEC Report for $1,000 testified that he sold other investments and borrowed money on a credit card in order to purchase 7,500 shares of USEC stock with the expectation that he would double his money after May 22. Id. at 26. That investor lost approximately $7,200 when he eventually sold the stock, two months after the approval of the new pricing agreement was supposed to have been announced. Id. He was never offered a refund of the purchase price of the USEC Report. Id. at 29. Although that investor tried on a number of occasions to get answers to specific questions about the status of USEC stock and the non-existent May 22 announcement, Stansberry merely responded that he could not give individualized investment advice. Trial Tr. 28, Mar. 24, 2005.

Investors certainly lost more than the $1,000 purchase price of the USEC Report. While Defendants reaped approximately $1 million in revenue from the sale of 1,217 copies of the Special Report, the losses to investors no doubt greatly exceeded that amount.

b. Degree of Participation and Scienter

Both Stansberry and Pirate were integral participants in the fraudulent scheme. Indeed, their culpability and participation are intertwined. Though Stansberry fabricated the false statements, Pirate also had a high level of participation in the communication of the false statements. Defendants targeted potential purchasers of the Special Report

through the Pirate database. It was a Pirate email that advertised the Special Report, and both the Super Insider Solicitation and the Special Report were ascribed to a commonly-used Pirate pseudonym, "Jay McDaniel." Stansberry testified at trial that he bears the ultimate responsibility for Pirate publications – "there's no doubt about it, I run the show." Trial Tr. 169, Mar. 22, 2005. Insofar as the Court has found that Stansberry acted with scienter because he knew that the statements he attributed to USEC were false, the scienter element is established.

c. The Isolated or Recurrent Nature of the Infraction

Since the USEC Special Report was issued in May of 2002, Pirate has issued many other "special reports." Trial Tr. 173, Mar. 30, 2005. Stansberry testified that one such report, which he authored, sold for $250 in 2003 and another that he authored with assistance of others in 2004 was free with a subscription to Stansberry's newsletter. Id. at 183. There is no evidence that there was another fraudulent scheme, however.

d. Defendants' Likely Involvement in Future Transactions

Defendants continue to distribute investment newsletters offering stock tips and advice.

e. Defendants' Recognition of Culpability

The Court does not, of course, fault the defense for raising the legal contentions presented in the instant case. However, the Court does not find that Stansberry recognizes his factual culpability and, indeed, finds that he testified falsely at trial.

f. Sincerity of Defendants' Assurances Against Future Violations

Defendants have not admitted the current fraudulent scheme. If Stansberry were to provide an assurance, that there would be no future violations, the Court would not find him particularly credible. The existence of an injunction against future fraudulent schemes of the type involved here will provide a needed measure of security against recidivism.

The Court finds, after weighing the relevant factors, that there is ample evidence of a "reasonable and substantial likelihood" that Defendants will violate securities laws in the future, absent an injunction. See Am. Realty Trust, 429 F. Supp. at 1175. Therefore, the Court shall enjoin Stansberry and Pirate from future violations of the securities laws or regulations by the SEC.

2. Disgorgement

The Commission has requested that the Defendants be ordered to disgorge their gains as a

result of their fraudulent activity. Disgorgement is appropriate when a district court has found a violation of the securities laws, so that the defendant must relinquish the unjust enrichment of his illegal activities. See, e.g. SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 95-96 (2d Cir. 1978).

The disgorgement amount "need only be a reasonable approximation of the profits casually connected to the violation." SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996). In the instant case, it does not appear that there was any substantial marginal cost to Stansberry or Pirate attributable to the receipts generated from the sales of the Special Report. Accordingly, the receipts from the sale of the Special Report, net of refunds paid, would fairly approximate the profit "causally connected to the violation."

Pirate sold 1,217 copies of the Special Report at $1,000 per report, and reimbursed 215 purchasers of the Special Report, refunding a total of $215,000. Thus, Pirate's net receipts for the sale was $1,002,000.[14] Stansberry testified that he received a commission from Pirate for the Special Report sale in

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[14] Although Pirate also offered purchasers of the Special Report who did not request a refund a complimentary subscription to its Extreme Value newsletter (a $1,000 value), the Court does not find that this offer actually cost Pirate anything or diminished the profit on the Special Report. Accordingly, the cost of the Extreme Value newsletter for 395 Special Report purchasers does not reduce Pirate's profit from sales of the Special Report.

the amount of $200,400. Trial Tr. 172-73, Mar. 22, 2005. Therefore, the profit "causally connected to the violation" was $200,400 for Stansberry and $801,600 for Pirate.

It is within the Court's discretion to hold wrongdoers joint and severally liable in securities cases when "two or more individuals or entities collaborate or have close relationships in engaging in the illegal conduct." SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997); see First Jersey Sec., Inc., 101 F.3d at 1475.

In the instant case, the Court finds it appropriate to hold Stansberry and Pirate jointly and severally liable for disgorgement of the entire amount of $1,002,000.

Stansberry testified that he ran "the show" and was the "person in charge" or Pirate. Trial Tr. 169, 171, Mar. 22, 2005. Stansberry and Pirate were was intimately involved in perpetrating the fraud at issue. Stansberry drafted the Super Insider Solicitation using a Pirate author's pseudonym, utilized Pirate's mailing list and newsletter, had sales of the Special Report, had Pirate receive the proceeds and keep the majority for itself. Furthermore, Stansberry testified that he received a bonus that was a percentage of Pirate's net income, and that in 2002, the year of this fraud, he "made substantially more." Id. at 169. He was unable to recall his specific bonus in 2002, estimating that it ranged from between $200,000 and $400,000.

Stansberry profited handsomely from Pirate's gain from the fraudulent scheme. Accordingly, the Court concludes that Stansberry and Pirate; therefore are to be jointly and severally liable for the entire $1,002,000 to be disgorged.

The Court finds it appropriate to exercise its discretion to award prejudgment interest with regard to the disgorgement. See Imgarten v. Bellboy Corp., 383 F. Supp. 2d 825, 846-47 (D. Md. 2005). The Court will borrow from Maryland law to fix the rate for prejudgment interest at 6% (simple) per annum. First Va. Bank v. Settles, 588 A.2d 803, 808 (Md. 1991). Prejudgment interest shall commence on May 21, 2002[15] and shall be calculated through July 21, 2007, the end of the last full month prior to the entry of Judgement. Thus, there shall be prejudgment interest of 6% per annum (simple) for five years and two months, that is, 62 months at .5% per month for a total of 31%.

Accordingly, with regard to disgorgement, Defendants Stansberry and Pirate are jointly and severally liable to pay the Clerk of Court the sum of $1,312,620[16] for disbursement pursuant to further Order.

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[15] The last day on which the Special Report could have been sold.

[16] Consisting of principal of $1,002,000 and prejudgment interest of $310,620.

3. Civil Penalty

The Commission has requested a third-tier civil monetary penalty be assessed against Defendants under 15 U.S.C. § 78u(d) (3) (B) (iii). Such a penalty is appropriate where violations involve: 1) "fraud, deceit, manipulation, or deliberate and reckless disregard of regulatory requirements"; and 2) the violation "resulted in substantial losses or created a significant risk of substantial loss to other persons." Id. For a third-tier penalty, the Court may assess up to $120,000 for each violation by an individual and $600,000 for each violation by an entity. Id.; 17 C.F.R. § 201.1002 (inflationary adjustment raising maximum penalty to $120,000).

Stansberry's conduct undoubtedly involved deliberate fraud, making statements that he knew to be false; Pirate acted in reckless disregard of regulations when it published Stansberry's unbelievable claims without a shred of confirmation. The violation plainly involved the risk of substantial loss to those who bought the Special Report and relied upon Stansberry's false statements in their stock purchase decisions.

The Court finds it appropriate to impose on Stansberry the maximum civil penalty, $120,000. As to Pirate, the Court finds that the SEC has not proven that any individual associated with the entity, other than Stansberry, had actual knowledge of the fraudulent scheme. Nor is there evidence that Pirate engaged in a pattern of fraudulent activity. Accordingly, the Court finds it appropriate to limit the civil penalty imposed on Pirate to $120,000 in

recognition of the fact that its culpability is based primarily upon the intentional conduct of one individual albeit aided and abetted by others.

III. CONCLUSION

For the foregoing reasons:

A. The Court finds that Plaintiff Securities and Exchange Commission has proven by clear and convincing evidence that Defendants Pirate Investor, LLC and Frank Porter Stansberry violated Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

B. The Court finds that Plaintiff Securities and Exchange Commission has not proven that Defendant Agora, Inc. itself (as distinct from its subsidiary) violated Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240. 10b-5.

C. The Court concludes that:

1. Defendants Pirate Investor, LLC and Frank Porter Stansberry are jointly and severally liable to pay the Clerk of Court the sum of $1,312,620 as disgorgement of profits.

2. A penalty be assessed under 15 U.S.C. § 78u(d) (3) (B) (iii) against Defendant Pirate Investor, LLC in the amount of $120,000.

3. A penalty be assessed under 15 U.S.C. § 78u(d) (3) (B) (iii) against Defendant Frank Porter Stansberry in the amount of $120,000.

6. Judgment shall be entered by separate Order.

SO DECIDED, on Wednesday, August 1, 2007.

s / Marvin J. Garbis
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES
SECURITIES AND
EXCHANGE
COMMISSION

Plaintiff

CIVIL ACTION NO.
MJG-03-1042

vs.

AGORA, INC., et al.

Defendants

* * * * *

MEMORANDUM AND ORDER

The Court has before it Plaintiff's Motion for Entry of Amended Final Judgment [Paper 119] and the materials submitted relating thereto. The Court finds a hearing unnecessary.

For the reasons stated in the Memorandum of Decision [Document 116], the Court on August 1, 2007, issued a Judgment Order [Document 117] finding that Defendants Pirate Investor, LLC

("Pirate") and Frank Porter Stansberry[1] ("Stansberry") had violated Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

Plaintiff has filed the instant motion seeking an Amended Judgment to address "any challenge Defendants may have to the overbreadth of the [original] injunction." Pl.'s Mem. Supp. Mot. For Entry of Amended Judgment at 1 (citing SEC v. Washington Investment Network, 475 F.3d 392 (D.C. Cir. 2007) (striking down a similar injunction to the one in the Court's Judgment Order)). In view of the fact that both sides sought modification – albeit in different ways – the Court has rescinded the Judgment Order and now issues an Amended Judgment Order and permanent Injunction.

Defendants contend that any injunction[2] must be narrowly drafted to cover only "solicitations for one-time, special reports that are not 'general and regular' as the court has interpreted that term." Defs.' Opp. at 2. Anything broader, it is claimed, would unjustifiably cover publications entitled to substantial First Amendment protections.

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[1] The term "Defendants" herein refers to Pirate and Stansberry, unless otherwise indicated.

[2] Defendants' argument that no injunction at all should be issued has been considered and rejected. See Memorandum of Decision [Document 116] at Part III.F.1.

The Court has decided to accept Plaintiff's proposed injunctive language essentially adopting the language of the rule violated by Defendants, but only to the extent allowed under SEC v. Savoy, 665 F.2d 1310 (D.C. Cir. 1981). In Savoy, the District of Columbia Circuit affirmed an injunction proposed by the SEC proposal except for a clause enjoining the defendant from violation of Rule 10b-5 by engaging "in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person." The Court reversed this clause because:

> [t]o allow this provision to stand could subject to the federal civil contempt power future acts by [the defendant] that may be completely unrelated to his lawbreaking in the past. In short, this part of the injunctive order is in our view so vague as to put the whole conduct of [the defendant's] business at the peril of a summons for contempt.

Id. at 1318-19 (internal quotations omitted). The language struck in Savoy is identical to the final clause of the SEC proposal in the instant case. Accordingly, the Court will utilize all but the final clause of the SEC proposal. See McComb v. Jacksonville Paper Co., 336 U.S. 187, 192 (1949) (upholding an injunction which "[b]y its terms . . . enjoined any practices which were violations of . . . statutory provisions" and finding that "[d]ecrees of that generality are often necessary to prevent further violations where a proclivity for unlawful conduct has been shown").

Finally, the Court notes Defendants' First Amendment contentions. However, the Permanent Injunction issued herewith enjoins Defendants from violating Rule 10b-5 but does not eliminate or reduce any available First Amendment protection. In determining whether any future 10b-5 violation has occurred, the communication at issue will be given all First Amendment protection to which it is entitled based on its content and character – not its title. Regardless of a communication's label (i.e., "regular publication" or "solicitations for one-time, special reports"), if the communication contains "pure speech" protected under New York Times v. Sullivan, 376 U.S. 254 (1964), it will receive the corresponding level of protection. If, however, the communication is of a character such as the publication in this case – a mere advertisement or purely commercial speech – then it will receive only "[t]he protection available for particular commercial expression[, which] turns on the nature both of the expression and of the governmental interests served by its regulation." Cent. Hudson v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980). Compare Alberti v. Cruise, 383 F.2d 268, 272 (4th Cir. 1967) (voiding an injunction enjoining the plaintiff from, among other things "contacting" the defendant as "clearly a prior restraint upon [the plaintiff]'s rights of freedom of speech...").

The "bottom line" is that the Permanent Injunction will not affect the extent of First Amendment protection available to any communication at issue.

CONCLUSION

For the foregoing reasons:

1. Plaintiff's Motion for Entry of Amended Final Judgment [Document 119] is GRANTED IN PART.

2. An Amended Judge Order and Permanent Injunction shall be issued herewith.

SO ORDERED, on Tuesday, October 2, 2007.

s / Marvin J. Garbis
United States District Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES
SECURITIES AND
EXCHANGE
COMMISSION

Plaintiff

CIVIL ACTION NO.
MJG-03-1042

vs.

AGORA, INC., et al.

Defendants

* * * * *

AMENDED JUDGMENT ORDER

The Court has issued its Memorandum of Decision [Document 116] and issued a Judgment Order [Document 117] on August 1, 2007 and has, this date, granted in part Plaintiff's Motion for Entry of Amended Final Judgment [Document 119].

In accordance with said actions:

1. Judgment shall be, and hereby is, entered in favor of Plaintiff Securities and Exchange Commission against Defendants Pirate Investor, LLC and Frank Porter Stansberry for violations

of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

2. Judgment shall be, and hereby is, entered in favor of Defendant Agora, Inc. against Plaintiff Securities and Exchange Commission on the charged violations of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

3. A Permanent Injunction enjoining Defendants Pirate Investor, LLC and Frank Porter Stansberry from actions specified therein shall be issued by separate Order herewith.

4. Defendant Pirate Investor, LLC and Defendant Frank Porter Stansberry are jointly and severally liable for disgorgement of $1,002,000, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $310,620.00, for a total of $1,312,620.00 with judgment interest thereon.

   a. The said Defendants shall pay the aforesaid sum to the Clerk of the Court.

b. The Clerk shall deposit the funds into an interest bearing account with the Court Registry Investment System ("CRIS") or any other type of interest bearing account that is utilized by the Court.

c. These funds, together with any interest and income earned thereon (collectively, the "Fund"), shall be held by the Clerk pending further Order.

d. The Court shall consider the parties' respective positions as to the distribution of said funds to be submitted upon the expiration of time for an appeal from the instant Amended Judgment or any appellate decision thereon.

5. Defendant Pirate Investor, LLC shall pay Plaintiff a civil penalty in the amount of $120,000 pursuant to 15 U.S.C. §78u(d) (3) (B) (iii) plus judgment interest thereon.

6. Defendant Frank Porter Stansberry shall pay Plaintiff a civil penalty in the amount of $120,000 pursuant to 15 U.S.C. §78u(d) (3) (B) (iii) plus judgment interest thereon.

7. Defendant Pirate Investor, LLC and Defendant Frank Porter Stansberry[1] shall pay all assessable costs of this action.

8. This Order shall be deemed to be a final judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED, on Tuesday, October 2, 2007.

s / Marvin J. Garbis
United States District Judge

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[1] The said Defendants are jointly and severally liable for assessable costs.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES
SECURITIES AND
EXCHANGE
COMMISSION

Plaintiff

CIVIL ACTION NO.
MJG-03-1042

vs.

AGORA, INC., et al.

Defendants

* * * * *

PERMANENT INJUNCTION

For reasons stated in the Memorandum of Decision [Document 116] and in accordance with the Amended Judgment issued herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants Pirate Investor, LLC and Frank Porter Stansberry, their agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Permanent Injunction by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange

Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C. F. R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

1. To employ any device, scheme, or artifice to defraud; or

2. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

SO ORDERED, on Tuesday, October 2, 2007.

s / Marvin J. Garbis
United States District Judge

Appendix F

IN THE COURT OF APPEALS
OF MARYLAND

No. 128

September Term, 2003

MELANIE SENTER LUBIN, SECURITIES COMMISSIONER FOR THE STATE OF MARYLAND

v.

AGORA, INC.

Bell, C.J.
Raker
Cathell
Harrell
Battaglia
Greene
Eldridge, John C.
(Retired, specially assigned)
JJ.

Opinion by Raker, J.

Filed: September 12, 2005

Julie L. Tewey (J. Joseph Curran, Jr., Attorney General of Maryland, on brief for Appellant)

Lee T. Ellis, Jr. (Bruce W. Sanford, Bruce D. Brown of Baker & Hostetler LLP, Washington, DC; Matthew J. Turner, General Counsel, Agora, Inc., Baltimore, Maryland, on brief for Appellee)

Pursuant to an investigation into potential violations of Maryland securities laws, appellant, the Maryland Securities Commissioner, served two subpoenas duces tecum on appellee, Agora, Inc., a company whose business includes publishing investment newsletters. Following Agora's refusal to produce its subscriber lists, marketing lists, and other documents containing information identifying any of its subscribers, the Commissioner filed a motion to compel enforcement. The trial court denied the motion, concluding that the Commissioner had failed to demonstrate a compelling need for the subscriber lists as required by the First Amendment and that the demand for subscriber lists was overbroad. We must decide whether the First Amendment to the United States Constitution prevents the Commissioner from compelling discovery of the identities of Agora's subscribers. We shall hold that it does.

I.

Agora is a Maryland corporation that publishes books and newsletters on topics such as investment, travel, leisure, and health. In the investment newsletter market, it fields more than a dozen offerings, with such colorful titles as "Pirate Investor," "Contrarian Speculator," and "The Flying

V Lockup Trader." It also operates an investors' group known as "The Oxford Club," which offers its members a variety of benefits, including a twice-monthly newsletter, internet advisories, meetings and seminars, a telephone hotline, and use of a club room at Agora's headquarters in Baltimore.

The Commissioner heads the Maryland Division of Securities (the "Division"), an administrative agency charged with enforcement of the Maryland Securities Act, Maryland Code (1975, 1999 Repl. Vol., 2004 Cum. Supp.) § 11-101 *et seq.* of the Corporations and Associations Article,[1] including the regulation of investment advisers and broker-dealers and the offer and sale of securities.

The Division commenced an investigation of Agora based on two activities undertaken by Agora. First, Agora sent a May, 2002 mass email ("the Email") to an indeterminate number of its own subscribers, and to other individuals drawn from commercially-available marketing lists.[2] The Email

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[1] Unless otherwise indicated, all future statutory references shall be to the Corporations and Associations Article of Maryland Code (1975, 1999 Repl. Vol, 2004 Cum. Supp.).

[2] The number and identities of the persons to whom Agora sent the Email are unknown to this Court, because this information is among that sought by the Commissioner and withheld by Agora. In its brief before this Court, however, Agora notes that the Email "was distributed to readers of well over a dozen Agora financial newsletters," and that a demand for a list of recipients equated to "a demand for a list of virtually all of Agora's investment newsletter subscribers." For purposes of this opinion, we will assume that at least some of the recipients of

offered a four-page report ("the Report") on an unnamed company, in which investors were promised they would "make a fortune." According to the Email, one of Agora's newsletter columnists had received "insider information" that a nuclear arms reduction treaty between the United States and Russia would be signed on a specific date and would create enormous profits for the unnamed company. The Email advised that investors could "double or even triple" their money by purchasing stock in the unnamed company on May 21, 2002, and selling two days later, after the public announcement of the international agreement. The name of this company would be revealed only to those who purchased the report, which was priced at $1,000.

How many copies of the report were transacted is unclear, but at least one person filed a complaint with the Division after he purchased the report, followed its advice to invest in United States Enrichment Corporation, Inc. ("USEC"), and lost money when the stock's price declined.

The second activity that interests the Division is Agora' s operation of the Oxford Club. In particular, the Division was concerned about a venture known as the "Oxford Club-Chairman's Circle," which, according to a direct-mail advertisement, featured "[l]ifetime access" to annual "private teleconference[s]

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the Email were subscribers to Agora publications, and that at least some of the recipients were not subscribers to Agora publications.

covering the issues most critical to our small group .. . the world's most knowledgeable experts to walk us through important strategies . . . a Chairman's Circle private researcher . . . to help you find specific information concerning a certain stock, offshore investments, global banking, real estate or any other issue concerning investing and wealth protection," as well as the "private numbers" of the Oxford Club's Executive Director, Research Director, and members of its Investment Advisory Panel. The price to join the Chairman's Circle was $5,000, and additional sums were due annually.

The Commissioner is investigating whether these activities violate Maryland securities law. First, she alleges that the Email or Report could violate the antifraud provisions codified at §§ 11-301 and 11-302 of the Securities Act.[3] Second, the Commissioner

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[3] Section 11-301 of the Securities Act makes it unlawful for:

"any person, in connection with the offer, sale or purchase of any security, directly or indirectly to: (1) Employ any device, scheme, or artifice to defraud; (2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person."

Section 11-302 of the Securities Act makes it unlawful for:

"any person who receives, directly or indirectly, any consideration from another person for advising the other person as to the value of securities or their purchase or sale, or for acting as an investment adviser or representative under § 11-

alleges that the activities of the Oxford Club (and possibly the Email and Report) could constitute individualized investment advice and thus subject Agora to the registration requirements of § 11-401.[4]

101(h) and (i) of this title, whether through the issuance of analyses, reports, or otherwise, to: (1) Employ any device, scheme, or artifice to defraud the other person; (2) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on the other person; (3) Engage in dishonest or unethical practices as the Commissioner may define by rule."

[4] Section 11-101(h) of the Securities Act defines an investment adviser as:

"[A] person who, for compensation . . . [e]ngages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities .. . or [p]rovides or offers to provide, directly or indirectly, financial and investment counseling or advice, on a group or individual basis."

Section 11-101(h)(2)(v) excludes from the definition of an investment adviser:

"[a] publisher of any bona fide newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client."

(Agora is not registered in Maryland as an investment advisor.) The Commissioner's concerns in this regard are not limited strictly to the Oxford Club; she suspects that Agora may be offering individualized investment advice in other contexts. Third, the Commissioner alleges that Agora may have referred customers to specific brokerages for specific trades, possibly including the USEC matter, thus acting as an "introducing broker" and subjecting it to the broker-dealer registration requirements of § 11-401.[5] (Agora is not registered in Maryland as a broker-dealer.)

In furtherance of her investigation, the Commissioner issued two subpoenas duces tecum

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Section 11-401(b) provides, in relevant part:

"[a] person may not transact business in this State as an investment adviser or as an investment adviser representative unless:

(I) The person is registered as an investment adviser or an investment adviser representative under this subtitle"

(The statute provides certain exemptions not applicable here.)

[5] Section 11-101(c) defines a broker-dealer as "a person engaged in the business of effecting transactions in securities for the account of others or for his own account." Certain exemptions from this definition are provided, but are not applicable here. Section 11-401(a) states that "[a] person may not transact business in this State as a broker-dealer or agent unless the person is registered under this subtitle."

pursuant to her power under § 11-701(b). In the June 26 subpoena, she demanded, *inter alia*,

> "4. Information regarding the circulation of The Oxford Club newsletter.
>
> 5. Information regarding the circulation of each of the following newsletters: [seventeen newsletters named.]
>
> * * *
>
> 10. Identifying information as to all persons and newsletter subscribers to whom the Tip [i.e. the Email] was electronically mailed or otherwise sent, including name, address, email address and telephone number, or all documents containing that information. For newsletter subscribers, please show which newsletters are subscribed to.
>
> 11. Identifying information for all persons and newsletter subscribers who purchased the Tip [i.e. the Report], including name, address, email address and telephone number, or all documents containing that information. For newsletter subscribers, please show which newsletters are subscribed to.
>
> * * *
>
> 14. All complaints or inquiries (including written, electronic and

> summaries of verbal complaints or inquiries) regarding the Tip or USEC Inc.
>
> 15. All correspondence regarding the Tip or USEC Inc."

In the March 31,2003 subpoena, the Commissioner demanded, inter alia,

> "28. Client files relating to the "Members Liaison" and "Telephone Hotline" referred to at p.7 of Exhibit E, including notes, memoranda and correspondence generated in connection with Oxford Club members' inquiries, including that with respect to member representatives and clients.
>
> 30. All complaints, including written complaints or synopses of verbal complaints, generated in connection with Exhibits A through E [Agora advertisements]."

Although Agora complied with the remainder of the subpoenas, it did not comply, or at least did not comply fully, with the items listed supra.

In March 2003, the Commissioner informally narrowed her request for subscriber identifying information with respect to Items 10 and 11 of the June 2002 subpoena, demanding that Agora produce identifying information for Maryland subscribers

only. Agora refused consistently to produce any information identifying any of its subscribers.

The Commissioner filed a complaint against Agora, amended in May 2003, in the Circuit Court for Baltimore City, for refusing to comply with the Division's June 2002 and March 2003 subpoenas, and moved for enforcement of the subpoenas. Agora admitted that it had not produced all the information demanded, but raised as an affirmative defense the protections of the First Amendment to the United States Constitution and Article 40 of the Maryland Declaration of Rights. The Circuit Court held a hearing as to whether the subpoena should be enforced. Before that court, the Securities Commissioner made clear to the court, and Agora agreed,[6] that the only issue before the court was the Commissioner's request to the court to enforce the subpoena for the subscriber list.

The Circuit Court for Baltimore County denied enforcement of the subpoenas. The court reasoned as follows:

> "I do not believe that in our Bill of Rights that there is any provision that has higher priority than the First Amendment, and I think courts must be

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[6] Agora advised the court at the hearing to enforce the subpoena, and before this Court at oral argument, that everything had been supplied to the State, with the exception of the subscriber lists. The State did not controvert this representation.

very zealous in guarding that most fundamental of all rights and not allow any erosion thereof.

And I do believe that what the Commissioner is attempting to do here is, in its own relatively small way, an attempt to erode the fundamental principle. I do not believe that the Commissioner has made out any compelling showing why Agora, Inc., must release its subscriber list..

In counsel's opening argument, she said it would be very helpful, and perhaps it would be. And even assuming it would be, that doesn't win the ball game. That's not what the Commissioner has to show. Counsel has argued it would be very useful to us. More than once, she said it would be very useful to us to show what the actions of Agora may have been.

Counsel has argued that by seeing these subscriber lists it may implicate Agora by talking to the subscribers, a fishing expedition is what this is called. You know, we'd like to talk to subscribers and maybe we'll find something to implicate Agora. Maybe so. Maybe you would, but that is no basis for this.

There is no attempt to zero in on certain subscribers or a certain class of

subscribers, but all subscribers. Not that a narrowing of the list would be permissible either, but at least we're not at that point. It's a shotgun approach.

Counsel has argued, well it's relevant to the inquiry. Well, a million things can be relevant to an inquiry. And particularly when you are beginning an inquiry, one never knows what might be relevant. And to simply say to the Court well, this is relevant to an inquiry, which means a very broad-based pursuit, looking for whatever you might be able to find, that's not enough.

I think there are other avenues that might well be available to the Commissioner to obtain the identity of certain subscribers, be able to talk to certain subscribers. There is no showing there at all that that would not be possible. There is no showing here at all that the Commissioner has made any concentrated effort to speak to subscribers, locate them, get the information which the Commissioner is seeking.

And the fact that counsel has stated, well, it's been narrowed down to Maryland subscribers is of no moment. I think it is definitely over broad.

> As I've indicated, if it were particularized to a certain group of subscribers only, I'm not sure whether that would remedy it either. But we don't have that situation. We have the situation here of all the subscribers in the State of Maryland. It is for these reasons that the Commissioner's motion is denied."

The Commissioner noted a timely appeal to the Court of Special Appeals. Before consideration by that court, we issued a writ of certiorari on our own initiative. *Securities Commissioner v. Agora*, 380 Md. 230, 844 A.2d 427 (2004).

II.

The Commissioner argues that the Circuit Court erred in its determination that First Amendment interests are implicated by the subpoenas and, therefore, failed to apply the proper test for enforcement of administrative subpoenas. The Commissioner argues that the subpoenas satisfy the three-part test articulated by the Supreme Court in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208-09, 66 S. Ct. 494, 505-06, 90 L. Ed. 614 (1946), and recognized by this Court in *Banach v. State Commission on Human Relations*, 277 Md. 502, 506, 356 A.2d 242, 245-46 (1976), for enforcement of an administrative agency subpoena: (1) "the inquiry is authorized by statute;" (2) "the information sought is relevant to the inquiry;" and (3) "the demand is not too indefinite or overbroad." *See also State*

Commission v. Freedom Express, 375 Md. 2, 12, 825 A.2d 354, 360 (2003).

The Commissioner asserts that the information sought is relevant to the investigation, which is authorized by statute, because having access to such information would allow the Division to investigate thoroughly whether Agora has violated provisions of the Securities Act, including §§ 11-301 and 11-302 (antifraud provisions), and § 11-401 (broker-dealer and investment adviser registration requirements). Speaking with subscribers and potential customers would allow the Commissioner to ascertain whether Agora transacted business as an investment adviser without registering as such in violation of § 11-401 by, for example, providing personalized investment advice at Agora-hosted conference calls and symposia. Having access to contact information for those persons who received the Email or purchased the Report also would enable the Commissioner to question those individuals about their dealings with Agora to determine whether Agora violated the Securities Act's antifraud provisions by, for example, communicating false or misleading information to investors in a nonpublished format. The Commissioner maintains that the subpoenas satisfy the third prong of the *Banach* test because the demands are sufficiently definite and reasonable in scope considering the purpose of the investigation, and compliance with the subpoenas would not be burdensome.

The Commissioner further contends that no legitimate First Amendment interest would be

implicated by enforcement of the subpoenas because the subpoenas do not restrict Agora's publishing activities in any way. The Commissioner claims that the subpoenas are enforceable because they were issued in connection with the Email, which she maintains is unprotected commercial speech because it is misleading and serves Agora's economic interests. Further, the Commissioner argues that the subpoenas do not implicate associational rights of Agora's subscribers because the Commissioner seeks subscriber identities only as a means of fulfilling her statutory duty to protect investors and not in an effort to learn more about their associational ties or political persuasions.

Agora argues that the First Amendment to the United States Constitution, Article 40 of the Maryland Declaration of Rights, and Maryland public policy promoting the free flow of information require a heightened level of review when an administrative subpoena seeks the disclosure of a publisher's subscriber lists. Instead of merely satisfying the *Banach* test, Agora argues, the Commissioner must show the relevancy of the information sought, a compelling need for the information, and proof that the State has no other available means of obtaining it. Claiming that it has standing to assert the constitutional rights of its subscribers, Agora also argues that the First Amendment associational rights of its readers trigger "exacting" scrutiny, as "probing questioning from regulators about their reading habits . . . will undoubtedly discourage these readers from maintaining their relationship with the publisher" and exercising their First Amendment

freedoms. *See Buckley v. Valeo*, 424 U.S. 1, 64, 96 S. Ct. 612, 656, 46 L. Ed. 2d 659 (1976) ("We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* [357 U.S. 449,78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)] we have required that the subordinating interests of the State must survive exacting scrutiny.")

Agora maintains that the Commissioner has failed to show a compelling need for subscriber lists and has not exhausted other avenues for investigating Agora's compliance with the Maryland Securities Act. First, Agora argues that the Division has no compelling need for subscriber lists in investigating whether Agora acted as an unregistered investment adviser in violation of § 11-401. Noting that the Commissioner has offered no evidence that Agora has provided personalized investment advice to its readers, Agora asserts that the subpoenas' "dragnet" for the identities of all subscribers cannot meet the heightened requirement of a compelling or overriding governmental need. Agora maintains that, in the context of the Division's inquiry into possible noncompliance with investment advisor provisions, there are alternatives to demanding subscriber lists. Such alternatives might include gathering information from a narrower group of individuals who participated in Agora seminars, conference calls, and telephone hotline services, or seeking information from Agora employees themselves regarding communications to subscribers.

Second, Agora maintains that there is no compelling or even relevant need for subscriber lists to investigate whether Agora violated antifraud provisions of Maryland securities laws. Even assuming that § 11-301 could provide a cause of action against Agora, which Agora maintains it could not,[7] Agora asserts that the text of its publications, along with its trading records, which it has produced, would suffice in determining whether it made any false or misleading statements "in connection with" the offer, sale, or purchase of securities. Further, Agora maintains that the Commissioner's desire to know the extent to which readers may have relied upon Agora's statements and suffered harm as a result cannot justify the demand for subscriber lists because reliance and damages are irrelevant to any action the Commissioner might bring against Agora under § 11-301. In sum, Agora argues that the Commissioner has made no compelling connection

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[7] Section 11-301 of the Maryland Securities Act makes it unlawful to make false or misleading statements "in connection with the offer, sale, or purchase of any security." Agora asserts that, as a mater of law, it cannot make a materially false statement "in connection with" the offer, sale, or purchase of any security because Agora merely publishes information about, and does not trade in, the stocks it recommends. *See SEC v. Wall Street Publ'g Inst.*, 664 F. Supp. 554, 556 (D.D.C. 1986), *rev'd on other grounds*, 851 F.2d 365 (D.C. Cir. 1988) (holding that statements in investment newsletters were not "in connection with" securities transactions merely because readers might rely on them in deciding whether to invest, and therefore § 10(b) of the Securities Exchange Act of 1934, the federal counterpart to § 11-301, is not applicable to the publisher of an investment newsletter).

between the subjects of the inquiry and the request for identifying information of Agora subscribers.

III.

We must determine whether the Commissioner legally may compel Agora to produce the subscriber lists. Ordinarily, administrative agency subpoenas will be enforced if the agency's investigation is statutorily authorized, the information sought by the subpoena is relevant to the investigation, and the demand is not indefinite or overbroad. *Banach v. St. Comm'n on Human Rel.*, 277 Md. 502, 506, 356 A.2d 242, 245-46 (1976). The First Amendment, however, creates "an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546, 83 S. Ct. 889, 893-949 L. Ed. 2d 929 (1963). We must examine the information sought by the Commissioner to determine whether to apply the ordinary *Banach* inquiry, or the much more exacting scrutiny required by the First Amendment. Having made that determination, we must then determine whether the applicable standard has been met.

The First Amendment to the United States Constitution provides in part that "Congress shall make no law . . . abridging the freedom of speech, or

of the press; or the right of the people peaceably to assemble."[8] The Supreme Court long has recognized that the freedoms of speech and the press protected by the First Amendment encompass much more than the right to speak, write, and publish. *See Griswold v. Connecticut*, 381 U. S. 479, 482, 85 S. Ct. 1678, 1680, 14 L. Ed. 2d 510 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read.") Recognizing the interdependence between receipt of information, on the one hand, and expression of information on the other, the Court has stated:

> "This right [to receive information and ideas] is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them . . .. More

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[8] Agora argues that the rights it asserts under the First Amendment are the same as the rights guaranteed by Article 40 of the Maryland Declaration of Rights. This Court often has interpreted Article 40 *in pari materia* with the First Amendment. *See State v. Brookins*, 380 Md. 345, 350 n.2, 844 A.2d 1162, 1165 n.2 (2004); *The Pack Shack, Inc., v. Howard County*, 377 Md. 55, 64 n.3, 832 A.2d 170, 176 n.3 (2003). As we stated in *The Pack Shack*, "[i]n light of the facts and arguments in the case at bar, . . . we shall regard the claimed violation of Article 40 and the claimed violation of the First Amendment as a single issue." *Id.* at 65 n.3, 832 A.2d at 176 n.3.

> importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."

Bd. of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 867, 102 S. Ct. 2799, 2808, 73 L. Ed. 2d 435 (1982) (emphasis in original).

The First Amendment protects broadly the rights of individuals to read and to receive ideas. First Amendment freedoms are implicated and infringed directly when the government denies access to or proscribes reading materials on the basis of the contents of those materials. *See, e.g., Id.* (holding that the First Amendment prohibits the government from removing books from the shelves of a school library based on the ideas contained in those books); *Stanley v. Georgia*, 394 U.S. 557, 559 89 S. Ct. 1243, 1245,22 L. Ed. 2d 542 (1969) (holding that a state statute criminalizing the mere possession of obscene materials in a person's home violates the First Amendment). The First Amendment is implicated also when regulations deter or interfere with the receipt of information and free flow of ideas.

In *United States v. Rumely*, 345 U.S. 41, 73 S. Ct. 543, 97 L. Ed. 770 (1953), the Supreme Court said of government inquiry into the identities of those who purchase or read certain materials:

> "Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all

> efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment."

Id. at 46, 73 S.Ct. at 546.[9] Unlike the majority in that case, Justice Douglas would have reached the constitutional issue. His concurrence explains persuasively how freedom of expression is threatened by government inquiry into the identities of those who purchase or read certain materials:

> "A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press .... Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. The

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[9] The majority in *Rumely* did not reach this constitutional issue because it concluded that the House of Representatives, in authorizing the Select Committee on Lobbying Activities to investigate "lobbying activities," had not conferred upon the committee the authority to inquire into matters such as the distribution of books and pamphlets to influence legislation indirectly. *Id.* at 47, 73 S. Ct. at 546.

> purchase of a book or pamphlet today may result in a subpoena tomorrow. Fear of criticism goes with every person into the bookstall. The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular . . . . The pres and its readers will pay a heavy price in harassment . . . . If [a book-buyer] can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, bookstores, and homes of the land . . . . Congress could not do this by law. The power of investigation is also limited."

Id. at 57-58, 73 S. Ct. 543, 551-52 (Douglas, J., concurring).

The Supreme Court has condemned as unconstitutional the deterrent effect on speech that could arise if the government required readers to identify themselves before receiving through the mail certain reading material. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 85 S. Ct. 1493, 14 L. Ed. 2d 398 (1965). In *Lamont*, the Court struck down a postal regulation that required an addressee to file a written request with the post office before receiving "communist political propaganda." *Id.* at 307, 85 S. Ct. at 1496. The Court held that the requirement that readers of such material identify themselves before getting access to the material was "almost certain to have a deterrent effect." *Id.* The Court

stated that the postal regulation at issue was "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment." *Id.* at 307, 85 S. Ct. at 1496- 97 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 720, 11 L. Ed. 2d 686 (1964). Although the Court did not hold explicitly that readers have a right to keep either their identities or the contents of what they read secret, *Lamont* at least suggests that the First Amendment protects a right to read anonymously, free from government monitoring or surveillance.

The Supreme Court has recognized that government inquiry into an individual's choice of associates may produce a chilling effect on exercise of the freedom of association protected by the First Amendment. Thus, an essential component of that freedom is a right of associational anonymity. *See generally NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). In *NAACP*, the Attorney General of Alabama filed suit in equity to enjoin the NAACP from conducting any activities in the state, alleging that the NAACP was a foreign corporation that had failed to qualify before doing business in the state. The State moved for the production of a large number of the NAACP's records and documents, including a list of the names and addresses of all Alabama members of the NAACP. The NAACP refused to produce its membership lists, contending that compelled disclosure abridged the constitutional rights of its members to engage in lawful association.

The Supreme Court held, as a threshold matter, that the NAACP had standing to assert the constitutional rights of its members because, if the members did possess the right to prevent release of their identities to the government, requiring the members to be parties to the litigation would nullify that right. *Id.* at 459, 78 S. Ct. at 1170. Underscoring the "vital relationship between freedom to associate and privacy in one's associations," *id.* at 462, 78 S. Ct. at 1172, the Court held that "immunity from state scrutiny of membership lists . . . is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." *Id.* at 466, 78 S. Ct. at 1174. Considering the physical threats, economic reprisals, and other displays of hostility faced by members whose identities had been revealed in the past, the Court stated that compelled disclosure of the NAACP's membership list entailed the likelihood of a "substantial restraint" upon the members' rights to associate freely. *Id.* at 462, 78 S. Ct. at 1172. Finally, concluding that disclosure of the names and addresses of the NAACP's members had no perceptible, substantial bearing on an inquiry into whether the organization had conducted business in the State or was required to comply with the registration statute, the Court held that the State of Alabama lacked an interest substantial enough to justify the likely deterrent effect of disclosure. *Id.* at 465-66, 78 S. Ct. at 1173-74.

Although the Supreme Court has not addressed squarely the issue of whether individuals have a

constitutionally protected right to read anonymously, the Court's First Amendment jurisprudence suggests that the government has no greater right to inquire into an individual's choice of reading materials than it does to inquire into an individual's choice of associates. Connecting the importance of privacy to the preservation of free speech, Justice Douglas opined that the First Amendment forbids the government from inquiring into the identities of persons who buy particular books or other printed materials. *Rumely*, 345 U.S. at 57-58, 73 S. Ct. at 551-52 (Douglas, J., concurring). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP*, 357 U.S. at 462, 73 S. Ct. at 1172 (citing *Rumely*, 345 U.S. at 57-58, 73 S. Ct. at 551-52 (Douglas, J., concurring)). In holding that the government may not criminalize the private possession of obscene materials, the Court in *Stanley* considered in tandem the "right to receive information and ideas, regardless of their social worth" and the "right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy." *Stanley*, 394 U.S. at 564, 89 S. Ct. at 1247-48. The Court recognized that the appellant in that case was asserting broadly "the right to be free from state inquiry into the contents of his library." *Id.* at 565, 89 S. Ct. at 1248.

More recently, the Court struck down a provision of a federal statute that required cable system operators to segregate and block "patently offensive"

sex-related material appearing on leased channels and to unblock and reblock the channel only upon a subscriber's written request. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996). Disapproving of the written notice requirement, the Court stated that the requirement "will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel." *Id.* at 754, 116 S. Ct. at 2391.

The Supreme Court has recognized that the right to privacy of association and belief guaranteed by the First Amendment encompasses more than the right to be free from government inquiry into one's membership in organizations and the names of one's co-members. Addressing the First Amendment implications of disclosure requirements[10] in the Federal Election Campaign Act of 1971, the Court stated that "invasion of privacy and belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for 'financial transactions can reveal much about a person's activities, associations, and beliefs.'" *Buckley v. Valeo*, 424 U.S.

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[10] The provisions at issue required, *inter alia*, that political committees and candidates file with the government reports containing the name, address, occupation, and principal place of business of any individual who contributed over $100.00 to the committee or candidate in a calendar year. *See* 2 U.S.C. § 431 *et seq.* (1970).

1, 66, 96 S. Ct. 612, 657, 46 L. Ed. 2d 659 (1976) (quoting *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79, 94 S. Ct. 1494, 1526, 39 L. Ed. 2d 812 (1974) (Powell, J., concurring)). Compelled disclosure of an individual's decision to read, purchase, or subscribe to certain publications may invade that individual's privacy of belief and association to just as great an extent.

To the extent that the Commissioner's subpoenas require Agora, a publisher, to disclose the identities of those who subscribe to or purchase its materials, the subpoenas seek information within the protective umbrella of the First Amendment. Enforcement of the subpoenas would intrude upon the First Amendment rights of Agora's subscribers and customers[11] because disclosure of their subscriber status and purchase of the Report would destroy the anonymity that the Supreme Court has recognized as important to the unfettered exercise of First Amendment freedoms. If the names of Agora's readers were disclosed to the government, they might be subjected to questioning from investigators about their reading habits. Agora's subscribers may be discouraged from reading its materials if they are interviewed by government personnel investigating potential securities violations, even if the readers are

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[11] The Commissioner has not argued that Agora does not have standing to assert the constitutional rights of its subscribers and customers. *Cf. Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93, 108 S. Ct. 636, 643, 98 L. Ed. 2d 782 (1988) (holding that booksellers had standing to allege an infringement of the First Amendment rights of bookbuyers).

told that, individually, they are not under investigation.

We do not accept the Commissioner's contention that Agora's subscribers enjoy a lower level of First Amendment protection because the Email or Report may have been "commercial speech," possibly even false commercial speech. Commercial speech enjoys a lower level of protection when it is true, and no protection at all when it is false or misleading. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Servo Comm'n of New York*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351, 65 L. Ed. 2d 341 (1980). But revealing the subscriber information would not only disclose that the subscribers had received the Email or Report; it would necessarily reveal that the subscribers had received other Agora publications. Even assuming *arguendo* that the Email and Report were commercial speech, there is no credible allegation that Agora's newsletters in general fit the Supreme Court's limited definition of that category, announced in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340, 106 S. Ct. 2968, 2976, 92 L. Ed. 2d 266 (1986) — "speech that does no more than propose a commercial transaction."

In order to compel production of the subscriber information, the Commissioner must therefore establish a substantial relation between the information sought and an overriding and compelling State interest. The Commissioner seeks the subscriber information in order to question subscribers whether Agora transmitted false and

misleading information in the Email, whether the subscribers had been witnesses or victims of other, unspecified acts of securities fraud by Agora, and whether they had ever been provided with brokerage services or individualized investment advice by Agora. Referring to Agora's subscribers, counsel for the Division stated at the hearing in the Circuit Court that "it would be very useful to us to be able to talk to those people." Although having access to lists of Agora's subscribers and customers might be helpful to the Commissioner in the context of the investigation, the Commissioner has not shown a compelling need for the subscriber information.

The Commissioner has failed to show a sufficient nexus between the investigation into whether Agora acted as an unregistered investment adviser, on the one hand, and the demand for a list of those subscribers who received the Email, on the other. The Commissioner has not alleged that the Email was individually tailored to the portfolios of individual recipients. The advertisements for the Oxford Club and other non-newsletter activities may suggest that, in the context of those activities, Agora engaged in conduct that constituted individual investment advice. But the Commissioner has not alleged that Agora provided individualized advice to newsletter subscribers. Likewise, no substantial nexus exists between the Commissioner's investigation into Agora's alleged unregistered brokerage activities and the indiscriminate demand for the identities of countless newsletter subscribers who possibly might have been offered such services.

The Commissioner also has failed to establish a nexus between the request for subscriber information and the investigation into whether Agora has engaged in fraud in connection with securities transactions. The question of whether the Email or other Agora advertisements and publications contain false or misleading statements may be resolved by examining the text of these communications; resolution of this question does not require a list of every person who received them.

The fact that the Commissioner might possibly ferret out additional instances of securities fraud by contacting essentially every subscriber to every Agora investment newsletter does not establish a sufficient nexus between that government interest and the wholesale disclosure of those subscribers' identities. Persons who believe that they have received false or misleading communications from Agora are entitled to contact the Division if they wish to; likewise they are entitled, under the First Amendment, to maintain their anonymity.

The Circuit Court characterized correctly the Division's desire for subscriber information as a "fishing expedition." Although access to this information might be useful to the Division's investigation, the State has not shown that it has any compelling need for its disclosure. Enforcement of this demand would "sacrifice First Amendment protections" for too "speculative a gain." *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 127, 93 S. Ct. 2080, 2099, 36 L. Ed. 2d 772 (1973). Agora cannot be compelled to produce the subscriber information.

The purchaser information gives rise to a slightly thornier First Amendment question, because individuals who purchased the Report were not necessarily subscribers to Agora's regular publications, and thus may not share the freedom of association concerns attributable to subscribers. Nonetheless, we believe that the speech-specific principles articulated in *Griswold*, *Pico*, *Rumely*, *Stanley*, and *Lamont* give rise to a protection that shields the identities of those who purchase individual publications. The United States District Court for the District of Columbia addressed this issue when the Office of Independent Counsel issued subpoenas duces tecum to two bookstores in the Washington D.C. area, demanding specific titles of books purchased by White House intern Monica Lewinsky. *See In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc.*, 26 Media L. Rptr. 1599 (D.D.C. 1998). Ms. Lewinsky alleged that her right to buy books had been chilled "for fear of intrusion and embarrassment." *Id.* at 1600. The bookstores claimed that enforcement of the subpoenas would burden not only their First Amendment rights to distribute reading materials, but also their customers' First Amendment rights to have access to such material. *Id.* The court concluded that the First Amendment was implicated by the subpoenas and that "the bookstores and Ms. Lewinsky have persuasively alleged a chilling effect on their First Amendment rights." *Id.*

The commercial speech doctrine does not diminish the protection that the First Amendment affords to the purchaser information. The "insider

information" contained within the Report may have been genuine; it may also have been fabricated. But so long as the Report did more than propose a commercial transaction between Agora and the purchasers, it was not solely "commercial speech," and its falsity would not diminish the purchasers' interests in anonymity.[12] *See Posadas de Puerto Rico*, 478 U.S. at 340, 106 S. Ct. at 2968. While the Report did urge its purchasers to engage in a commercial transaction, viz., investment in USEC stock, it did not propose that its readers should buy their shares from Agora.

We therefore consider the request for purchaser information under the standard for First Amendment-implicated subpoenas. Much as with the subscriber information, we conclude that the speculative value of the purchaser information does not outweigh the burden that compelled disclosure would place on the First Amendment interests of the individuals identified. Although it is possible that the Report contained false or misleading information, the Commissioner has the Report and can evaluate the statements made therein without requiring Agora to reveal the identities of the purchasers. The

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[12] We also question the Commissioner's underlying premise, *i.e.*, that readers of commercial/speech enjoy a lesser right to anonymity than readers of fully-protected speech. The commercial speech doctrine has developed in the context of government attempts to regulate speech itself, and appellant has cited no authority for the proposition that the doctrine gives rise to a symmetrical diminution in the right to read anonymously.

investigation into the Email and Report began with a complaint from a disgruntled purchaser, suggesting that such persons are capable of coming forward if they wish their identities known.[13]

The Commissioner raises the possibility that Agora might have provided brokerage services in connection with the Report—that certain purchasers could have placed their orders for USEC stock with brokers recommended by Agora or in which Agora owned a financial interest. The Commissioner provides no basis for this allegation, however, beyond the general suspicion that Agora may be providing unregistered brokerage services in other contexts, and her interpretation of some Agora advertising materials as "suggest[ing] that subscribers receive different levels of service depending on how much they are willing to spend." The Commissioner has nowhere indicated that the sole consumer complaint concerning the Report contained any allegation of offers by Agora to broker transactions in USEC stock. Thus, while learning the identities of those who

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[13] The record indicates that the purchaser in question traded USEC stock after receiving the Report. We therefore do not decide whether the Commissioner would have a compelling interest in learning purchaser identities if she had no other means of investigating investor reliance. Resolving this issue would require us to consider an underlying question of Maryland securities law: whether investor reliance must be proven in order to establish securities fraud under § 11-301. We shall not consider such an important issue of securities law, one not necessary to the decision in the instant case, which is not a prosecution or enforcement action under § 11-301, and one not briefed or argued.

purchased the Report would be useful in investigating whether those persons were offered brokerage services, the Commissioner's suspicions in this regard lack any meaningful foundation. Such speculation cannot form the basis for a substantial relation to a compelling state interest that would justify invading the First Amendment's sphere of protection over the purchasers' anonymity. Agora cannot be compelled to produce the purchaser information.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

Appendix G

FILED: NOVEMBER 13, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

—

No. 08-1037
(1:03-cv-01042-MJG)

—

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff - Appellee

v.

PIRATE INVESTOR LLC; FRANK PORTER STANSBERRY,

Defendants - Appellants

and

AGORA, INCORPORATED,

Defendant

JAMES DALE DAVIDSON,

Intervenor/ Defendant

FORBES, LLC; HEARST CORPORATION; TRIBUNE COMPANY, (including the Baltimore Sun); EAGLE FINANCIAL, INCORPORATED; INVESTORPLACE MEDIA, LLC; AMERICAN SOCIETY OF NEWSPAPER EDITORS;

CALIFORNIA FIRST AMENDMENT COALITION; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS; THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION,

Amici Supporting Appellant

ORDER

The Court grants the motion for leave to file an amici curiae brief in support of the request for rehearing en banc and denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer and Judge Motz.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix H

FILED: DECEMBER 11, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

—

No. 08-1037
(1:03-cv-01042-MJG)

—

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff - Appellee

v.

PIRATE INVESTOR LLC; FRANK PORTER STANSBERRY,

Defendants - Appellants

—

O R D E R

—

Upon consideration of Appellant's unopposed motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari, the Court grants the motion.

Entered at the direction of Judge Niemeyer and Judge Motz acting as a quorum pursuant to 28 U.S.C. § 46(d).

For the Court

/s/ Patricia S. Connor, Clerk

Appendix I

FILED: MARCH 12, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

—

No. 08-1037
(1:03-cv-01042-MJG)

—

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff - Appellee
v.
PIRATE INVESTOR LLC; FRANK PORTER STANSBERRY,
Defendants - Appellants
and
AGORA, INCORPORATED,
Defendant
JAMES DALE DAVIDSON,
Intervenor/ Defendant

FORBES, LLC; HEARST CORPORATION; TRIBUNE COMPANY, (including the Baltimore Sun); EAGLE FINANCIAL, INCORPORATED; INVESTORPLACE MEDIA, LLC; AMERICAN SOCIETY OF NEWSPAPER EDITORS; CALIFORNIA FIRST AMENDMENT COALITION; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF

PROFESSIONAL JOURNALISTS; THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION,

Amici Supporting Appellant

ORDER

Upon consideration of the unopposed motion to extend the stay of mandate pending filing of petition for certiorari through March 26, 2010, the Court, for good cause shown, grants the motion.

Entered at the direction of Judge Niemeyer and Judge Motz, acting as a quorum pursuant to 28 U.S.C. §46(d).

For the Court

/s/ Patricia S. Connor, Clerk

Appendix J

DOUBLE YOUR MONEY ON MAY 22ND
WITH THIS *SUPER INSIDER* TIP

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Dear Investor,

I've recently learned the details of a major international agreement between the United States and Russia that will create more than $2.5 billion in profits for one small U.S. company.

Investors in this company are going to make a fortune – for reasons that I can detail for you here. And, best of all, because of my source - a senior company executive - I can even tell you EXACTLY WHEN the deal will be finalized and announced to the public.

The deal will close on May 22nd, only a few days from now. The company involved is publicly traded - on the New York Stock Exchange - and it's currently paying an 8% annual dividend. Although the company has a billion dollars in net assets, it has been forgotten by Wall Street and today it's valued for less than $600 million.

Meanwhile, reasonable projections see the upcoming deal adding at least $2.5 BILLION in profits to the company's bottomline. Although the market value of the stock could soar by four or five times (it's only a $7.00 stock), I'm conservatively estimating that the shares will double.

Let me show you why.

On May 23rd the United States and the Russian government will sign a new arms reduction agreement that will reduce the number of nuclear warheads around the world by around 10,000 Thousands of investors watching CNN or CNBC will see the ceremony, with all its pomp and circumstance, live from St, Petersburg, Russia. But only a handful of investors will have already profited on the behind-the-scenes-maneuvering that put one company in a position to make an outrageous profit on the new treaty.

If you follow politics closely, the upcoming U.S.-Russian summit probably isn't news to you. Details are already leaking out to the media. For example, on The Wall Street Journal's May 8th front-page: "the U.S. and Russia now appear on track to sign a nuclear arms reduction treaty at the-Bush-Putin summit." What you haven't read in the papers yet is how this deal will mean hundreds of millions of dollars in windfall profits for one company. In fact, on May 22nd - the day before the summit begins - shares in this stock should more than DOUBLE, as the new agreement with the Russians will mean fat profits through the year 2013. A high-level corporate executive - someone definitely in a position to know - passed along the details to me. He explained how the deal would benefit his company – raising its profit margins by 20 percentage points. He even told me the precise day the deal would be announced.

This is the kind of insider information that could make you a lot of money. And you won't have to risk

much either...

In fact, the company the question is already a terrific bargain. It's valued by the stock market for around HALF of net assets. It pays an 8% dividend annually. In each of the last four years it sold over a billion dollars worth of product. This year alone it will have over $150 million in cash flow thanks to excess inventory reductions. This is a profitable business, with or without a treaty with the Russians. Despite its assets, sales and terrific strategic position, the market values the entire company at less than $600 million because this is an "old-economy" stock.

In other words, you could probably DOUBLE your money on this stock as the stock market recovers - with or without the sweetheart deal the company has negotiated as part of the upcoming nuclear arms agreement. And, with the information I'm prepared to give you, you won't have to wait for the stock market to recover. This stock will probably double - and could even triple or more - on the news I know will be announced in a few days.

Make no mistake - my plan to double your money is extremely low risk. This is a billion dollar corporation (in sales) that's currently valued at less than $600 million and that pays an 8% annual dividend. I'm not even recommending the options on this stock - just the regular shares. If you can double your money in one day on a low risk speculation, why get greedy?

But, for just a moment, forget about the blue chip description, the 8% dividend, the Russian presidential summit - I'll fill in the details as we go.

Focus on doubling your investment dollar SAFELY on the back of an insider tip. I can even tell you exactly which day the pop in the stock should happen. Like I told you, it's a Wednesday later this month - May 22nd. The news will be all over CNN. The President of the United States will be involved. And one company - just one company - stands to gain at least $250 million in income each year for the foreseeable future (at least through 2013). Considering that the stock in question is only valued at $600 million today...well. I'm conservatively estimating that the stock will double. But it could certainly go up a lot more than that...

Again - this tip is for a single stock. It trades on the New York Stock Exchange. It pays an 8% dividend. It has a virtual monopoly on its business in the U.S. And I can tell you precisely when, why and how its shares should double later this month. Downside if I'm wrong? Most likely zero. After all, the stock is already trading at less than net assets and it's paying an 8% annual dividend. This could be the simplest, safest and easiest way you'll ever double or even triple your money. Ever. And I'm going to give you a summary of the opportunity, right here in this email.

HOW TO MAKE A LOT OF MONEY, WITHOUT RISKING ANY (HINT: POLITICS)

I'm sure you're wondering – how is it possible to double your money on a safe stock in one day? How can you double or triple your money – in less than a month – without buying speculative stock or stock options? How can you make a killing without putting much at risk?

In a word, politics.

That's right. Living in the greater Washington D.C. metropolitan area has its distinct advantages. Recessions never hit this part of the country because the government never stops growing. And. the insider tips you get at the country clubs here have nothing to do with something as risky as venture capital. Instead, I hear about the dirty, but sometimes very profitable, world of politics.

Maybe you haven't heard about it yet, but the upcoming U.S.-Russia summit is big news here in D.C. President Putin will host President Bush for three days in Russia. According to my source - and backed up by rumors that have been reported in the mainstream press - the major announcement of this summit will be an important new strategic alliance between the United States and Russia, relating to nuclear stockpiles and a new strategic defense system to protect both our countries from nuclear missiles...

The company I'm passing along to you will be a direct beneficiary of this agreement, to the tune of billions of dollars in profits.

See how this works? It's a total insider deal. Money and favors in exchange for a fat deal with the Russians. Hey, I know it's dirty. But I don't make the rules and I don't run the company or involve myself in politics. On the other hand, I see nothing wrong with profiting from my insider knowledge of this deal and I don't think you should be ashamed to do so either.

It's a great opportunity. Let me give you a few of the details now.

THE DETAILS YOU NEED TO MAKE A QUICK (AND HUGE) PROFIT

First, the company that will profit at the expense of the Russians is well known and (obviously) well connected.

In fact, the company was spun out of the U.S. government in 1993, which helps to explain why it has so much access to the government corporate welfare trough. Let me reiterate: this is a major company, not some penny stock. On the balance sheet you'll find over $200 million in cash and over $800 million in inventory (some of which was just liquidated for over $150 million). Net assets are valued at more than $950 million. But - get this - today the stock trades for less than $600 million - despite paying an 8% dividend this year.

This is a major company that sells a critically important commodity all over the world. It has had over a billion dollars in sales for the last four years and positive earnings per share each of the last four years too.

So...what's wrong with this picture? If this is such a great company, why is the stock so undervalued?

Because without the upcoming deal with the Russians and the support it gets from the U.S. government (protective tariffs), its costs match its sales revenue. In other words, this company - absent

its upcoming deal with the Russians - would probably only breakeven this year.

So...the market is a down on the company. But I know the deal with the Russians is about to go through...! Once the deal with the Russians goes through, the company's net margins should exceed 20% - netting it around $250 million per year, even if you assume its market doesn't grow at all!

And guess what? The deal with the Russians has ALREADY BEEN SIGNED. That's right. It's all done, locked up. Finished. The only thing that both sides are waiting on is the proper media event to announce this commercial cooperation between the Ruskies and us. It's a feel good thing. It's PR for the politicians. You know how the game works. The important work is done in advance. so that when the cameras are rolling, everything comes off without a hitch.

Who is my source? Well...I can't tell you, except to say that he is a senior executive inside the company. He is definitely in a position to know the intimate deals of this agreement.

Wait a minute you say...isn't this insider trading? Well, it might be except because I'm willing to give you all of the details, it's now public information. (You don't have to wonder why I'm bringing you this information. I can't make money with this idea unless I make it public first). Why haven't the other investment newsletter writers at www.pirateinvestor.com told you about this opportunity?

Frankly, they probably wouldn't touch this stock. They're free-market guys. They loathe the fact that this stock has a monopoly on its commodity product in the United States. And Porter Stansberry or Dan Ferris would tell you that this company's technology isn't cutting edge.

But, to me, that hardly matters, because - right or wrong - the company operates in the United States with a VIRTUAL MONOPOLY. It has persuaded Washington to slap a huge tariff on its foreign competition - a tariff that ensures it will operate profitably in the United States for at least the next five years. Furthermore, the company has landed a deal with the Russians for the raw materials it needs to reduce its production cost by 20% or more. All that's left is the government approval for the contract - which is coming on May 22nd, just in time for the Bush-Putin summit.

ARE YOU INTERESTED? WANT TO ROLL THE (LOADED) DICE WITH ME THIS MONTH?

Now...before I ask you if you're interested in this information, I have to make one thing perfectly, crystal clear. I'm not a Merrill Lynch stock analyst. I'm not hyping this thing to you because I'm trying to raise money for an IPO. No. I'm in the business of selling independent investment research...and frankly this is the best tip I've ever come across. And, because I make my living as a provider of unbiased information...I'm willing to sell you this information before I even establish a position in the stock myself. What could be fairer?

Unfortunately, there's one more thing I have to remind you about. I can't guarantee that the stock will pop. Nobody can guarantee the actions of the stock market. But, I can guarantee you (and Porter Stansberry has agreed to vouch for me and stand behind my guarantee) that everything I've told you here about the company is true and accurate. In fact, if you're interested in getting in on this deal, I'll provide you with a report IMMEDIATELY that proves everything I've said above. By that I mean:

#1. The financial position, history of the company and the balance sheet information is 100% correct

#2. The company's future financial situation has been accurately represented here.

#3. The company has historically paid a dividend. Currently it's paying $0.1375 per quarter, which judging by the current share price of $6.50 would equal an 8% yield for investors this year. (I can't guarantee that the company will continue to pay the dividend - only the board of directors could do that - but I can show you that the company has a solid history of paying dividends and the financial resources to continue to pay them).

#4. The deal I allude to here - with a Russian company - for a new, cheaper supply of raw materials, is, according to public company documents, finalized.

#5. U.S. government officials have said in public that a deal of the nature I've represented here will be announced at the upcoming Bush-Putin summit.

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Now, assuming for the moment that everything I'm able to guarantee is correct, how much would confirmation from a company insider be worth to you? Well, that depends on how much you have to invest doesn't it?

Let's say that you've got a small investment portfolio. Just $10,000. Could you stake all of it on a deal like this? I don't see why not. The company is trading for less than net current assets. It has plenty of cash and is paying an 8% dividend. The stock, by the way, is trending higher, from a low of around $4. This is no penny stock either: it does over a billion a year in sales.

I'm not asking you to bet the farm on a new drug or a new widget. This is a bricks and mortar company selling a widely used industrial commodity. This is a Warren Buffett kind of stock. Only I can tell you exactly when it should spike higher based on a major international news event...

How much is information like this worth to you?

A REPORT THAT COULD DOUBLE YOUR INVESTMENT DOLLAR IN A SINGLE DAY

I'm going to make this very easy for you. I'm not asking you to subscribe to my newsletter in exchange for this information. (I don't even write a newsletter). I'm not asking you to follow a trading system. (I don't have one). I'm not going to bother you with subsequent emails or follow-up phone calls. Nope.

This is a simple, one-shot deal. I'll simply give you immediate access to a full report on the opportunity, including all of the back up information you'd need to verify everything I've told you here.

If you're interested, and you think the price is fair, all you have to do is buy one four-page report. You can verify all of the details I'll provide with documents available via public records. I'll even give you an internet link to the company's most recent financial data.

And you can buy the report through a link at the bottom of this page. You'll have INSTANT ACCESS to the report. I can't make it any easier.

Let me repeat my offer: This blue chip, undervalued stock, which pays an 8% dividend, should double on May 22nd because of a key new commercial arrangement between the United States government and Russia. All the insiders are preparing to take profits...and you can join them.

So...what is this information worth?

Let's say you take my advice and I'm right on the money. Let's say - just for the sake of argument - that the stock hits a new all-time high. It goes to $14. You'd make 100% on your money - even after trading costs.

Now look, I know that a lot of you can afford to put a lot more than $10,000 on this kind of safe, high return play. It's not an option play. It's not a growth stock. It's not even a tech stock. Nope. It's a high

dividend paying commodity company. But even if you only have $10,000 to invest, I could help make you double that $10,000 in a few days. Heck, I can even tell you exactly which day to buy (May 21st) and sell (May 23rd). There's nothing else you'll have to do.

So...what price do you think is fair for this kind of information? How much would you pay?

Lots of people spend $10,000 or more for solid, profitable investment advice. After all, if you're making money with the information, it's worth it. But these services all require lots of trading...and lots of risk taking. With the deal I'm offering you today, all you have to do is buy one stock. And, as I've shown you, it's a low-risk stock.

Other services charge $5,000 or more for so-called "insider" connections. Conference call services, "angel" investment clubs and the like. And the deals always entail super high-risk bets that take YEARS to mature - if they ever do.

What I'm offering you today is far superior to both of these kinds of offers. It's low risk and it will come to fruition - one way or the other - this month. If the deal doesn't hit big, your capital won't be tied up forever and there's almost no chance you'll lose money because the company pays such a big dividend and is so undervalued relative to assets. Plus, its just one stock. There's not all of the work required to follow an investment "system."

So...what's a fair price? Honestly, I have no idea. It really depends on how much money you have to

invest. If you're going to put a million dollars on this - and you could - then the information is probably worth $50,000 or more. But I know most of you don't have that kind of money to play with (though some of you do). No matter how much you decide to invest. I'll give instant access to the information to anyone who cares to pay $1,000 for it. It's not cheap - but if we double our money this month - it's easily worth it.

And, by the way, I might not recommend stocks all that often, but I've been in and around the investment publishing business longer than Porter Stansberry, Steve Sjuggerud, and Dan Ferris combined. From time to time – as you see here – I come across very solid information. I hope you'll use this lead to your best advantage. Your friends won't understand your newfound interest in politics...and they won't know where you got the money for your new house, boat, car, and vacation either.

Sincerely,
Jay McDaniel

P.S. To buy this special INSIDER TIP report, just click here:

<http://pirateinvestor.com/Reports/350SSIT/DR/W350C504.cfm>

Appendix K

DOUBLE YOUR MONEY ON THE UPCOMING ARMS AGREEMENT: BUY USEC (NYSE: USU, $6.50)

Dear Investor,

Thank you for your interest in my special report. As you'll see, I've left no stone unturned for you.

But, if you're the kind of person who likes to buy first and ask questions later, call your broker now and tell him to buy shares of USEC (NYSE: USU, $6.50). The company is the leading vendor of enriched uranium in the United States. Enriched uranium is the fuel required by almost all nuclear power plants around the world.

The main advantage of nuclear power is its ability to derive enormous amounts of energy from a tiny amount of fuel. One metric ton of nuclear fuel can produce the equivalent of 2-3 million tons of fossil fuel. For example, one kilogram of coal can generate 3 kilowatt-hours of electricity. But one kilogram of nuclear fuel can generate 400,000 kilowatt-hours.

As our economy grows and becomes more energy dependent and as we seek to become less reliant on foreign oil supplies, nuclear power will undoubtedly play a role of growing importance to our economy. Today there are 107 active nuclear reactors in the United States. operating at about 90% of capacity. However, there's only one U.S. vendor of fuel for

these reactors: USEC. And, in total, the company sells fuel to 170 nuclear reactors around the world.

Let me briefly outline the bullish case for the company.

USEC has signed long-term fuel contracts with power companies around the world. However, the cost to USEC to fulfill these contracts is variable. In the past. the company has fulfilled demand for nuclear fuel via two sources - nuclear warheads from the U.S. and Russian arsenals and USEC's own uranium enrichment process.

This is a very big business. USEC recorded well over $1 billion in sales during each of the last four years. But, like any commodity business, USEC's profits are directly linked to its costs of production versus the market price of the commodity. Lately, due to increased production by the Western European providers - Eurodif and Urenco - the market price of enriched uranium fuel has fallen. At the same time, USEC's market advantage - a U.S. brokered deal to acquire Russian uranium from its nuclear weapons stockpile - hadn't envisioned changing prices. USEC's old deal with the Russians (first brokered in 1997) provides enriched uranium at fixed prices that are no longer economically beneficial to USEC because of the falling global price of uranium.

(By the way, nuclear fuel vendors sell uranium in units called - SWU - a Single Work Unit. It's the nuclear equivalent to a gallon of gasoline).

USEC negotiated a new, market priced, deal with its Russian supplier in May of 2000, but the supply of cheap uranium has been on hold for two years pending government approval of the deal. That squeezed USEC's profits.

Period Ending	31-Mar-02
Current Assets	
Cash and Cash Equivalents	$219,300,000
Net Receivables	$159,300,000
Inventory	$835,500,000
Other Current Assets	$20,100,000
Total Current Assets	$1,234,200,000
Long Term Assets	
Property Plant and Equipment	$608,700,000
Other Assets	$123,300,000
Deferred L.T. Asset Charges	$48,200,000
Total Assets	$2,014,400,000
Current Liabilities	
Accounts Payable	$210,100,000
Other Current Liabilities	$52,700,000
Total Current Liabilities	$262,800,000
Long Term Debt	$500,000,000
Other Liabilities	$268,200,000
Long Term Liability Charges	$31,300,000
Total Liabilities	$1,062,300,000
Stock Holders Equity	
Common Stock	$10,000,000
Retained Earnings	$14,700,000
Treasury Stock	[unintelligible]
Capital Surplus	$1,066,200,000
Other Stockholder Equity	[unintelligible]
Total Stockholder Equity	$952,100,000
Net Tangible Assets	$952,100,000

For example, back in 1999 the company was getting plenty of cheap Russian uranium. It had over $1.4 billion in SWU revenue that year ($1.5 billion in total revenue) and its cost of sales was a little over $1.18 billion. The company made $346 million in gross profit. That's pretty incredible for a company valued by the market today for less than half that amount.

On essentially the same demand for its product in 2001. the company had revenues of $1.1 billion (lower revenue total reflects the lower average sale price) but its cost of sales was $991 million. The company's margins – always thin in a commodity business - had begun to disappear. Net income was only $78.4 million.

The 2001 figures aren't terrible for a $600 million company...but they'd be a heck of a lot better if USEC could re-establish a cheap Russian supply of enriched uranium. And that's exactly what's going to happen on May 22nd.

Before I get to the details of the new Russian agreement, I want to go over some of the company's financial statements to justify what I told you earlier about the company.

USEC IS AN ASSET RICH COMPANY

First, here's the balance sheet from the company's most recent 10K. As you can see, the company has over $1.2 billion in current assets against only $262 million in current liabilities - an extremely liquid position. It also has over $2 billion in total assets against only $1 billion in total liabilities. I'm not

suggesting that you gamble on an Internet stock here. This company is an asset rich and cash rich company. (To see the full balance sheet, income and cash flow statements, visit this website: http://biz.yahoo.com/fin/1/u/usu.html)

There's only one thing about this balance sheet you should be cautious about - the inventory figures. USEC was originally a branch of the Department of Energy. Then in 1993 it became United States Enrichment Corporation, wholly owned by the U.S. Government. Finally USEC went public in a July 1998 IPO. Becoming a standalone public company. Almost all of its assets originally came from the government - including its stockpile of uranium. Recently. around $230 million worth of its uranium inventory was discovered to have elevated levels of technetium, ruining it as a fuel. This would devalue the stockpile considerably and force the company to take a charge against shareholder's equity. But. USEC and the Department of Energy have agreed on a process, including further sampling, to determine the actual amount of material that may be affected. This process is expected to be completed in the first half of 2002. After a determination is made on how much uranium is affected, the process of getting reimbursed by the Department of Energy will begin. There are legal and regulatory specifications that the government agreed to as part of the privatization process and there's good reason to expect the government can be made to reimburse the company for the defective materials, though no agreement has been reached yet. In other words, keep in mind that $230 million or so of those assets could be impaired.

Revenue

Quarters	1999	2000	2001	2002
Sep	307,900	230,900	226,800	300,500
Dec	422,400	447,600	387,100	560,100
Mar	260,400	281,800	243,100	249,400
Jun	537,900	529,100	286,900	
Totals	**1,528,600**	**1,489,400**	**1,143,900**	**1,110,000**

Note: Units in Thousands of U.S. Dollars

Earnings Per Share

Quarters	1999	2000	2001	2002
Sep	0.63	0.16	0.06	-0.06
Dec	0.32	0.36	0.26	0.12
Mar	0.16	0.25	0.56	0.05
Jun	0.41	-0.74	0.09	
Totals	**1.52**	**0.03**	**0.97**	**0.11**

keep in mind that $230 million or so of those assets could be impaired.

Besides a robust balance sheet, USEC also has a long and successful operating history. As you can see here, the company continues to deliver over a billion dollars a year in revenues and - even with the recent challenges to its Russian supply of enriched uranium - it has been posting positive earnings each year as a public company.

What could change these numbers radically in the future is a new deal with the Russians. And, in fact, such a deal has already been signed.

THE RUSSIAN DEAL

USEC plays an important role in nuclear disarmament. It is the U.S. government's agent in the nuclear warheads to nuclear fuel program. The original Russian deal was signed in April 1997, prior to the company's public offering and has a 20-year term. Over the life of the 20-year Russian contract, USEC expects to purchase approximately 92 million SWU derived from 500 metric tons of highly enriched uranium. So far 22.4 million SWU has been purchased.

In the past this Russian supply has been very important to the company's production. Purchases from the Russian Federation represented 52% of USEC's production total in 2001. And, pending approval of a new, market-based pricing agreement. USEC expects purchases of the Russian SWU will make up approximately 60% of its production total in

2002. But only if a new, market-based contract is approved. Until then the company has suspended the buying of Russian SWU.

As I mentioned. the good news is that USEC has already reached such an agreement with its Russian partner. A deal was signed in May 2000 that includes market-based pricing and runs through 2013. **But implementation of the agreement is subject to review and approval by the U. S. and Russian governments.**

The uncertainty about when this deal would be approved has led to the company's stock trading in limbo - and at very cheap prices – since early 2000 when SWU prices fell. A USEC senior executive has assured me that the new Russian agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said *"watch the stock on May 22nd."*

The media is confirming the tip.

From *The Wall Street Journal* May 8th, page A15: *"The centerpiece of the summit, to be held May 23-26 in Moscow and St. Petersburg, is likely to be the signing of a treaty cutting offensive nuclear weapons. The accord would reduce U.S. and Russian arsenals* to *between 1,700 and 2,200 warheads each, down from their present level at about 6,000* to *7,000; for the U.S. and 6,000 for Russia."* Just as importantly, the Russians need USEC's buying of their excess enriched uranium to continue because of the economic difficulties in Russia. As *The Wall Street Journal noted "an offer of contracts for [Russia's] economically distressed defense industry could help soften criticism that President Vladimir Putin has*

yet to gain any substantial benefits from his pro-Western policies." The USEC deal alone could send nearly a half billion dollars to Russia each year.

And the financial benefit to USEC is substantial too. Company representatives explain that American SWU prices are now between $105 and $107 per unit. With Russian enriched uranium. USEC's unit cost per SWU is less than $80. Without it. Their cost is roughly the current market price. Thus, the company stands to gain 20 percentage points of profit margin on around $1 billion in sale contracts – or $250 million in gross profit. All it needs are the politicians to sign off on the deal!

And that, according to my source, will happen - finally - on May 22nd.

With the deal in place, USEC should make between $150 and $200 million in net profits in 2003. These profits should continue too - the new deal with the Russians extends through 2013. Furthermore, demand for nuclear fuel is likely to increase during this time period. With only five global vendors of enriched uranium, it's not hard to imagine the cost of nuclear fuel rising in the future, creating growing profits over time for USEC.

Without the deal in place, USEC will probably clear $50 million or so in net profits next year. But, in either case, it's hard to imagine the company cutting its current dividend of $0.1375 per quarter. The company has plenty of cash. the ability to trim inventory, operational profits and a sales backlog of $5.4 billion.

That's why I consider this a safe speculation. It's hard to imagine investors getting hurt with this Stock at its current price - you're buying at roughly half of book value and you're getting paid 8% a year to wait until the Russian supply deal gets worked out. Hopefully, if my source is right, it won't take long...

Jay McDaniel
May 13, 2002

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Appendix L

Wingfield Steven

From: Porter Stansberry [porter@pirateinvestor.com]

Sent: Tuesday, May 14, 2002 11 :04 AM

To: Bill Bonner; Myles Norin; Laura Davis; Christoph Amberger; Addison Wiggin; Matt Turner

Cc: Mark Ford (compuserve); George Rayburn

Subject: $1,000 stock tip is selling: 107 so afar -

InsiderSpecialReport.pdf

Hi everyone,

About two weeks ago I stumbled onto some very good information (which is turning out to be correct) about a company called USEC that sells enriched uranium.

The upcoming arms reduction treaty between the U.S. and Russia would appear to open the door to a much cheaper supply of enriched uranium for USEC, which is currently paying an 8% dividend and valued at half of net assets.

Someone in the company - a confidential source - told me a specific date to watch the stock. Unfortunately, the company - which is heavily dependent on government favors (including new tariffs and this deal with the Russians) didn't meet the objectives of my newsletter. So I didn't include the stock in my newsletter or portfolio.

However, I couldn't pass up such great and potentially valuable information on what could be a very lucrative speculation. So...I wrote a promotion based on the information and the situation and put it out under Jody Madron's pen name - Jay McDaniel.

The promotion is below and I'll attach a PDF copy of the report to this email.

By the way, just before we sent this promotion to our file, Bush came out and announced that an arms control deal with the Russians would be signed in Russia in a few days. Nothing was announced by USEC on whether this definitely means a cheaper supply of uranium though. Thus, officially, we're still waiting for May 22nd.

And, please note this - USEC's shares popped at about 3:30 pm yesterday, after Bush made his announcement. But, the pop didn't come from us. We didn't send the promotion until 6:30 pm.

If you're interested in running the following promo I'm happy to split the revenues with you 50/50 -- which, according to Myles - is a fair deal because this is a one time shot sale only with no follow-on revenue.

But, I'd urge you to hurry. USEC will probably rush its announcement because of the attention we're bringing to the stock. In fact, their investor relationship person just called to find out what the hell is going on...

Regards,
Porter

****

Here's the promo:

THE BLAST
May 13, 2002

****

DOUBLE YOUR MONEY ON MAY 22ND
WITH THIS *SUPER INSIDER* TIP

****

Dear Investor,

I've recently learned the details of a major international agreement between the United States and Russia that will create more than $2.5 billion in profits for one small U.S. company.

Investors in this company are going to make a fortune -- for reasons that I can detail for you here. And, best of all, because of my source - a senior company executive - I can even tell you EXACTLY WHEN the deal will be finalized and announced to the public.

The deal will close on May 22nd, only a few days from now. The company involved is publicly traded - on the New York Stock Exchange - and it's currently paying an 8% annual dividend. Although the company has a billion dollars in net assets, it has been forgotten by

Wall Street and today it's valued for less than $600 million.

Meanwhile, reasonable projections see the upcoming deal adding at least $2.5 BILLION in profits to the company's bottomline. Although the market value of the stock could soar by four or five times (it's only a $7.00 stock), I'm conservatively estimating that the shares will double.

Let me show you why.

On May 23rd the United States and the Russian government will sign a new arms reduction agreement that will reduce the number of nuclear warheads around the world by around 10,000 Thousands of investors watching CNN or CNBC will see the ceremony, with all its pomp and circumstance, live from St, Petersburg, Russia. But only a handful of investors will have already profited on the behind-the-scenes-maneuvering that put one company in a position to make an outrageous profit on the new treaty.

If you follow politics closely, the upcoming U.S.-Russian summit probably isn't news to you. Details are already leaking out to the media. For example, on The Wall Street Journal's May 8th front-page: "the U.S. and Russia now appear on track to sign a nuclear arms reduction treaty at the-Bush-Putin summit." What you haven't read in the papers yet is how this deal will mean hundreds of millions of dollars in windfall profits for one company. In fact, on May 22nd - the day before the summit begins - shares in this stock should more than DOUBLE, as the new

agreement with the Russians will mean fat profits through the year 2013. A high-level corporate executive - someone definitely in a position to know - passed along the details to me. He explained how the deal would benefit his company – raising its profit margins by 20 percentage points. He even told me the precise day the deal would be announced.

This is the kind of insider information that could make you a lot of money. And you won't have to risk much either...

In fact, the company the question is already a terrific bargain. It's valued by the stock market for around HALF of net assets. It pays an 8% dividend annually. In each of the last four years it sold over a billion dollars worth of product. This year alone it will have over $150 million in cash flow thanks to excess inventory reductions. This is a profitable business, with or without a treaty with the Russians. Despite its assets, sales and terrific strategic position, the market values the entire company at less than $600 million because this is an "old-economy" stock.

In other words, you could probably DOUBLE your money on this stock as the stock market recovers - with or without the sweetheart deal the company has negotiated as part of the upcoming nuclear arms agreement. And, with the information I'm prepared to give you, you won't have to wait for the stock market to recover. This stock will probably double - and could even triple or more - on the news I know will be announced in a few days.

Make no mistake - my plan to double your money is extremely low risk. This is a billion dollar corporation (in sales) that's currently valued at less than $600 million and that pays an 8% annual dividend. I'm not even recommending the options on this stock - just the regular shares. If you can double your money in one day on a low risk speculation, why get greedy?

But, for just a moment, forget about the blue chip description, the 8% dividend, the Russian presidential summit - I'll fill in the details as we go.

Focus on doubling your investment dollar SAFELY on the back of an insider tip. I can even tell you exactly which day the pop in the stock should happen. Like I told you, it's a Wednesday later this month - May 22nd. The news will be all over CNN. The President of the United States will be involved. And one company - just one company - stands to gain at least $250 million in income each year for the foreseeable future (at least through 2013). Considering that the stock in question is only valued at $600 million today...well. I'm conservatively estimating that the stock will double. But it could certainly go up a lot more than that...

Again - this tip is for a single stock. It trades on the New York Stock Exchange. It pays an 8% dividend. It has a virtual monopoly on its business in the U.S. And I can tell you precisely when, why and how its shares should double later this month. Downside if I'm wrong? Most likely zero. After all, the stock is already trading at less than net assets and it's paying an 8% annual dividend. This could be the simplest, safest and easiest way you'll ever double or even

triple your money. Ever. And I'm going to give you a summary of the opportunity, right here in this email.

HOW TO MAKE A LOT OF MONEY, WITHOUT RISKING ANY (HINT: POLITICS)

I'm sure you're wondering – how is it possible to double your money on a safe stock in one day? How can you double or triple your money – in less than a month – without buying speculative stock or stock options? How can you make a killing without putting much at risk?

In a word, politics.

That's right. Living in the greater Washington D.C. metropolitan area has its distinct advantages. Recessions never hit this part of the country because the government never stops growing. And. the insider tips you get at the country clubs here have nothing to do with something as risky as venture capital. Instead, I hear about the dirty, but sometimes very profitable, world of politics.

Maybe you haven't heard about it yet, but the upcoming U.S.-Russia summit is big news here in D.C. President Putin will host President Bush for three days in Russia. According to my source - and backed up by rumors that have been reported in the mainstream press - the major announcement of this summit will be an important new strategic alliance between the United States and Russia, relating to nuclear stockpiles and a new strategic defense system to protect both our countries from nuclear missiles...

The company I'm passing along to you will be a direct beneficiary of this agreement, to the tune of billions of dollars in profits.

See how this works? It's a total insider deal. Money and favors in exchange for a fat deal with the Russians. Hey, I know it's dirty. But I don't make the rules and I don't run the company or involve myself in politics. On the other hand, I see nothing wrong with profiting from my insider knowledge of this deal and I don't think you should be ashamed to do so either.

It's a great opportunity. Let me give you a few of the details now.

THE DETAILS YOU NEED TO MAKE A QUICK (AND HUGE) PROFIT

First, the company that will profit at the expense of the Russians is well known and (obviously) well connected.

In fact, the company was spun out of the U.S. government in 1993, which helps to explain why it has so much access to the government corporate welfare trough. Let me reiterate: this is a major company, not some penny stock. On the balance sheet you'll find over $200 million in cash and over $800 million in inventory (some of which was just liquidated for over $150 million). Net assets are valued at more than $950 million. But - get this - today the stock trades for less than $600 million - despite paying an 8% dividend this year.

This is a major company that sells a critically important commodity all over the world. It has had over a billion dollars in sales for the last four years and positive earnings per share each of the last four years too.

So...what's wrong with this picture? If this is such a great company, why is the stock so undervalued?

Because without the upcoming deal with the Russians and the support it gets from the U.S. government (protective tariffs), its costs match its sales revenue. In other words, this company - absent its upcoming deal with the Russians - would probably only breakeven this year.

So...the market is a down on the company. But I know the deal with the Russians is about to go through...! Once the deal with the Russians goes through, the company's net margins should exceed 20% - netting it around $250 million per year, even if you assume its market doesn't grow at all!

And guess what? The deal with the Russians has ALREADY BEEN SIGNED. That's right. It's all done, locked up. Finished. The only thing that both sides are waiting on is the proper media event to announce this commercial cooperation between the Ruskies and us. It's a feel good thing. It's PR for the politicians. You know how the game works. The important work is done in advance. so that when the cameras are rolling, everything comes off without a hitch.

Who is my source? Well...I can't tell you, except to say that he is a senior executive inside the company. He is definitely in a position to know the intimate deals of this agreement.

Wait a minute you say...isn't this insider trading? Well, it might be except because I'm willing to give you all of the details, it's now public information. (You don't have to wonder why I'm bringing you this information. I can't make money with this idea unless I make it public first). Why haven't the other investment newsletter writers at www.pirateinvestor.com told you about this opportunity?

Frankly, they probably wouldn't touch this stock. They're free-market guys. They loathe the fact that this stock has a monopoly on its commodity product in the United States. And Porter Stansberry or Dan Ferris would tell you that this company's technology isn't cutting edge.

But, to me, that hardly matters, because - right or wrong - the company operates in the United States with a VIRTUAL MONOPOLY. It has persuaded Washington to slap a huge tariff on its foreign competition - a tariff that ensures it will operate profitably in the United States for at least the next five years. Furthermore, the company has landed a deal with the Russians for the raw materials it needs to reduce its production cost by 20% or more. All that's left is the government approval for the contract - which is coming on May 22nd, just in time for the Bush-Putin summit.

ARE YOU INTERESTED? WANT TO ROLL THE (LOADED) DICE WITH ME THIS MONTH?

Now...before I ask you if you're interested in this information, I have to make one thing perfectly, crystal clear. I'm not a Merrill Lynch stock analyst. I'm not hyping this thing to you because I'm trying to raise money for an IPO. No. I'm in the business of selling independent investment research...and frankly this is the best tip I've ever come across. And, because I make my living as a provider of unbiased information...I'm willing to sell you this information before I even establish a position in the stock myself. What could be fairer?

Unfortunately, there's one more thing I have to remind you about. I can't guarantee that the stock will pop. Nobody can guarantee the actions of the stock market. But, I can guarantee you (and Porter Stansberry has agreed to vouch for me and stand behind my guarantee) that everything I've told you here about the company is true and accurate. In fact, if you're interested in getting in on this deal, I'll provide you with a report IMMEDIATELY that proves everything I've said above. By that I mean:

#1. The financial position, history of the company and the balance sheet information is 100% correct

#2. The company's future financial situation has been accurately represented here.

#3. The company has historically paid a dividend. Currently it's paying $0.1375 per quarter, which judging by the current share price of $6.50 would

equal an 8% yield for investors this year. (I can't guarantee that the company will continue to pay the dividend - only the board of directors could do that - but I can show you that the company has a solid history of paying dividends and the financial resources to continue to pay them).

#4. The deal I allude to here - with a Russian company - for a new, cheaper supply of raw materials, is, according to public company documents, finalized.

#5. U.S. government officials have said in public that a deal of the nature I've represented here will be announced at the upcoming Bush-Putin summit.

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Now, assuming for the moment that everything I'm able to guarantee is correct, how much would confirmation from a company insider be worth to you? Well, that depends on how much you have to invest doesn't it?

Let's say that you've got a small investment portfolio. Just $10,000. Could you stake all of it on a deal like this? I don't see why not. The company is trading for less than net current assets. It has plenty of cash and is paying an 8% dividend. The stock, by the way, is trending higher, from a low of around $4. This is no penny stock either: it does over a billion a year in sales.

I'm not asking you to bet the farm on a new drug or a new widget. This is a bricks and mortar company

selling a widely used industrial commodity. This is a Warren Buffett kind of stock. Only I can tell you exactly when it should spike higher based on a major international news event...

How much is information like this worth to you?

A REPORT THAT COULD DOUBLE YOUR INVESTMENT DOLLAR IN A SINGLE DAY

I'm going to make this very easy for you. I'm not asking you to subscribe to my newsletter in exchange for this information. (I don't even write a newsletter). I'm not asking you to follow a trading system. (I don't have one). I'm not going to bother you with subsequent emails or follow-up phone calls. Nope. This is a simple, one-shot deal. I'll simply give you immediate access to a full report on the opportunity, including all of the back up information you'd need to verify everything I've told you here.

If you're interested, and you think the price is fair, all you have to do is buy one four-page report. You can verify all of the details I'll provide with documents available via public records. I'll even give you an internet link to the company's most recent financial data.

And you can buy the report through a link at the bottom of this page. You'll have INSTANT ACCESS to the report. I can't make it any easier.

Let me repeat my offer: This blue chip, undervalued stock, which pays an 8% dividend, should double on May 22nd because of a key new commercial

arrangement between the United States government and Russia. All the insiders are preparing to take profits...and you can join them.

So...what is this information worth?

Let's say you take my advice and I'm right on the money. Let's say - just for the sake of argument - that the stock hits a new all-time high. It goes to $14. You'd make 100% on your money - even after trading costs.

Now look, I know that a lot of you can afford to put a lot more than $10,000 on this kind of safe, high return play. It's not an option play. It's not a growth stock. It's not even a tech stock. Nope. It's a high dividend paying commodity company. But even if you only have $10,000 to invest, I could help make you double that $10,000 in a few days. Heck, I can even tell you exactly which day to buy (May 21st) and sell (May 23rd). There's nothing else you'll have to do.

So...what price do you think is fair for this kind of information? How much would you pay?

Lots of people spend $10,000 or more for solid, profitable investment advice. After all, if you're making money with the information, it's worth it. But these services all require lots of trading...and lots of risk taking. With the deal I'm offering you today, all you have to do is buy one stock. And, as I've shown you, it's a low-risk stock.

Other services charge $5,000 or more for so-called "insider" connections. Conference call services,

"angel" investment clubs and the like. And the deals always entail super high-risk bets that take YEARS to mature - if they ever do.

What I'm offering you today is far superior to both of these kinds of offers. It's low risk and it will come to fruition - one way or the other - this month. If the deal doesn't hit big, your capital won't be tied up forever and there's almost no chance you'll lose money because the company pays such a big dividend and is so undervalued relative to assets. Plus, its just one stock. There's not all of the work required to follow an investment "system."

So...what's a fair price? Honestly, I have no idea. It really depends on how much money you have to invest. If you're going to put a million dollars on this - and you could - then the information is probably worth $50,000 or more. But I know most of you don't have that kind of money to play with (though some of you do). No matter how much you decide to invest. I'll give instant access to the information to anyone who cares to pay $1,000 for it. It's not cheap - but if we double our money this month - it's easily worth it.

And, by the way, I might not recommend stocks all that often, but I've been in and around the investment publishing business longer than Porter Stansberry, Steve Sjuggerud, and Dan Ferris combined. From time to time – as you see here – I come across very solid information. I hope you'll use this lead to your best advantage. Your friends won't understand your newfound interest in politics...and they won't know where you got the money for your new house, boat, car, and vacation either.

Sincerely,
Jay McDaniel

P.S. To buy this special INSIDER TIP report, just click here:

<http://pirateinvestor.com/Reports/350SSIT/DR/W350C504.cfm>

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FYI NOTICE

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Here's the Report:

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Appendix M

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 3, 2010

Mr. Bruce W. Sanford
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Washington Square, Suite 1100
Washington, DC 20036

Re: Pirate Investor LLC, et al.
v. Securities and Exchange Commission
Application No. 09A720

Dear Mr. Sanford:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on February 3, 2010 extended the time to and including March 11, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk

Appendix N

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 3, 2010

Mr. Bruce W. Sanford
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Washington Square, Suite 1100
Washington, DC 20036

Re: Pirate Investor LLC, et al.
v. Securities and Exchange Commission
Application No. 09A720

Dear Mr. Sanford:

The application for a further extension of time in the above-entitled case has been presented to The Chief Justice, who on March 3, 2010 extended the time to and including March 26, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk

(5)

No. 09-1176

In the Supreme Court of the United States

PIRATE INVESTOR LLC, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Senior Counsel
Securities and Exchange Commission
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QUESTIONS PRESENTED

1. Whether petitioners violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, by falsely claiming to have inside information bearing on the value of a publicly-traded stock.

2. Whether a district court's factual findings in a securities-fraud case are subject to the heightened procedural protections applicable to defamation claims against public figures.

3. Whether the district court violated the First Amendment by entering an injunction against future violations of Section 10(b) and Rule 10b-5.

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In the Supreme Court of the United States

No. 09-1176

PIRATE INVESTOR LLC, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 580 F.3d 233. The opinion of the district court (Pet. App. 52a-105a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2009. A petition for rehearing was denied on November 13, 2009 (Pet. App. 151a-152a). On February 3, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 11, 2010. On March 3, 2010, the Chief Justice further extended the time to March 26, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Pirate Investor LLC (Pirate) publishes investment newsletters and provides its subscribers with an e-mail service called the "Blast." Pet. App. 5a. Petitioner Frank Porter Stansberry is Pirate's editor-in-chief. *Ibid.*

In April 2002, Stansberry learned of a company called USEC, Inc. Pet. App. 6a. USEC enriches uranium and is the executive agent for the United States under a 1993 disarmament pact between the United States and Russia. *Ibid.* As part of that agreement, known as "Megatons to Megawatts," Russia sells uranium formerly used in Soviet nuclear warheads to the United States for use as fuel in nuclear power plants. *Ibid.* The pact requires USEC and its Russian corporate counterpart to periodically renegotiate the uranium's price, subject to agreement by both governments. *Ibid.* After a pricing agreement expired in 2001, the two companies negotiated a new agreement in February 2002. *Ibid.* As of May 2, 2002, however, neither government had approved the new agreement, so it had not gone into effect. *Ibid.*

On May 2, 2002, after learning of the pricing agreement, Stansberry called Steven Wingfield, USEC's Director of Investor Relations. Pet. App. 6a-7a. The call lasted approximately one hour. *Id.* at 54a-55a. The district court subsequently found that "[t]here was, during the conference call, no communication from Wingfield to Stansberry providing 'insider information' regarding USEC." *Id.* at 55a. "In particular, Wingfield did not tell Stansberry that the * * * pricing agreement would be approved on May 22 or tell him to watch the stock on that date." *Ibid.*; see *id.* at 10a.

2. Following his conversation with Wingfield, Stansberry prepared an e-mail with the subject line "DOUBLE YOUR MONEY ON MAY 22ND WITH THIS *SUPER INSIDER* TIP." Pet. App. 157a; see *id.* at 7a. The e-mail offered to sell for $1000 an investment report that would identify the name of a company whose stock price was poised to increase. *Id.* at 169a. The e-mail, in which Stansberry used the name "Jay McDaniel," said that McDaniel had "insider information" obtained from a "senior company executive" of the undisclosed company about "the details of a major international agreement between the United States and Russia that will create more than $2.5 billion in profits" for the company. *Id.* at 157a-158a, 169a. According to the e-mail, a "high-level corporate executive—someone definitely in a position to know—passed along the details," including "the precise day the deal would be announced." *Id.* at 158a.

The e-mail stated that, based on the company source, the "deal will close on May 22nd." Pet. App. 157a. The e-mail also predicted that on May 22 shares in the stock, then trading at $7 per share, "should more than DOUBLE, as the new agreement with the Russians will mean fat profits through the year 2013." *Id.* at 157a, 158a. Writing as "McDaniel," Stansberry stated: "I can guarantee you (and Porter Stansberry has agreed to vouch for me and stand behind my guarantee) that everything I've told you here about the company is true and accurate." *Id.* at 165a.

On the evening of May 13, 2002, Stansberry sent the e-mail to the Pirate Investor Blast Database, a list of e-mail addresses of subscribers to Pirate products. Pet. App. 9a. More than 100 of the recipients paid $1000 to receive the "Special Report" that identified USEC as

the company referenced in the "Super Insider Tip" e-mail. *Id.* at 8a, 9a n.7, 170a, 177a. The Report, which Stansberry also signed as "Jay McDaniel," stated that USEC had reached an agreement with its Russian partner, that the United States and Russian governments needed to approve the agreement, and that "uncertainty about when this deal would be approved has led to the company's stock trading in limbo—and at very cheap prices—since early 2000." *Id.* at 177a, 179a. Stansberry wrote in the Report that a "USEC senior executive ha[d] assured [him] that the new Russian agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said *'watch the stock on May 22nd.'*" *Id.* at 177a. The Special Report reiterated that all USEC needed was for "politicians to sign off on the deal," and it stated that, "according to my source, [that approval] will happen—finally—on May 22." *Id.* at 178a (emphasis omitted).

In the five months before Stansberry sent his original e-mail solicitation, the trading volume of USEC common stock averaged approximately 189,000 shares a day. Pet. App. 57a. In the ten days after the e-mail was sent, trading volume averaged 3.3 million shares a day. *Ibid.* The stock price also increased, and "the district court determined [the increase] was the result of purchases by early recipients of the solicitation and special report." *Id.* at 26a. Starting on May 17, Stansberry sent out new versions of the original e-mail to a larger group of recipients. *Ibid.*; see *id.* at 56a. In those later versions, Stansberry included references to the stock's new price ($9) and "pointed out that the stock in question 'has jumped this week and looks poised to go much higher.'" *Id.* at 26a.

More than 800,000 individuals received the solicitation e-mail, and investors purchased 1217 copies of the USEC Special Report. Pet. App. 9a. Those purchases resulted in net proceeds of $1,005,000, of which Pirate received $626,500. *Ibid.*

3. No announcement of the approval of the pricing agreement was made on May 22, 2002. The price of USEC stock fell that day from $9.54 to $8.20 a share. Pet. App. 57a-58a. Approval of the agreement was ultimately announced on June 19, 2002. *Id.* at 10a.

4. On April 18, 2003, the Securities and Exchange Commission (SEC or Commission) filed a complaint against petitioners, alleging that they had violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5.[1] Pet. App. 10a, 58a. After a bench trial, the district court held that petitioners had violated Section 10(b) and Rule 10b-5 by falsely claiming that a company insider had provided the information in the "Super Insider Tip" e-mail and the USEC Special Report regarding the precise date of approval of the pricing agreement. *Id.* at 52a-105a. The district court required petitioners to disgorge the profits they had received from their fraudulent conduct, *id.* at 112a, imposed a civil penalty of

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[1] Section 10(b) makes it "unlawful for any person, directly or indirectly, * * * [t]o use or employ, in connection with the purchase or sale of any security * * *, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. 78j(b). Pursuant to its Section 10(b) rulemaking authority, the SEC has promulgated Rule 10b-5, which makes it "unlawful for any person, directly or indirectly, * * * [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made * * * not misleading, * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5(b).

$120,000 on each petitioner, *id.* at 113a, and entered an injunction that prohibited petitioners from engaging in further violations of Section 10(b) and Rule 10b-5, *id.* at 115a-116a.

5. The court of appeals affirmed. Pet. App. 1a-51a. The court first rejected petitioners' contention that "their conduct did not constitute a violation of [Section] 10(b)." Pet. App. 11a. The court explained that, "[i]n a civil enforcement action under [Section] 10(b), the SEC must establish that the defendant (1) made a false statement or omission (2) of material fact (3) with scienter (4) in connection with the purchase or sale of securities." *Ibid.* (internal quotation marks and citation omitted).

The court of appeals found that each of these elements was satisfied in this case. First, Stansberry's statement that a company insider had told him that the Russian agreement would be announced on May 22 was false. Pet. App. 12a. "The district court found that Wingfield never told Stansberry that approval of the pricing agreement would be announced on May 22," and petitioners did not challenge that finding on appeal. *Ibid.*; see *id.* at 10a n.8. Second, the false statement was material because a "reasonable investor would treat a particular stock recommendation differently depending on whether or not the recommender was acting on inside information." *Id.* at 14a-15a. Third, the court of appeals affirmed the district court's finding of scienter because "Stansberry was in a position to know whether or not his statements were true." *Id.* at 20a. "As other courts have recognized, the fact that a defendant publishes statements when in possession of facts suggesting that the statements are false is 'classic evidence of scienter.'" *Ibid.* (quoting *Aldridge* v. *A.T. Cross Corp.*, 284 F.3d 72, 83 (1st Cir. 2002)). Fourth, the fraud occurred

"in connection with" the purchase of securities because "securities purchases were necessary to complete [petitioners'] fraudulent scheme," petitioners had "made their representations with the intent to induce securities transactions," and petitioners had "directed the misrepresentations to investors that they knew were likely to rely on them." *Id.* at 41a.

The court of appeals also rejected petitioners' contention "that the district court should have found that the Super Insider Tip E-mail and USEC Special Report were entitled to the heightened protections for expression that the Supreme Court recognized in *New York Times* v. *Sullivan*," a defamation case involving a public figure. Pet. App. 48a-49a. The court held that the Commission did not have to prove by clear and convincing evidence that petitioners had made their misrepresentations with actual malice because punishing fraud "simply does not violate the First Amendment." *Id.* at 49a. The court of appeals also rejected petitioners' First Amendment challenge to the injunction against future fraudulent conduct, explaining that "[t]he injunction does not constitute an unlawful prior restraint because it only enjoins [petitioners] from engaging in securities fraud, which * * * is unprotected speech." *Id.* at 50a. The court declined to address petitioners' contention "that the injunction is a disfavored 'obey the law' injunction" because petitioners had raised that argument for the first time in their reply brief. *Id.* at 50a n.23.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court, another federal court of appeals, or (as petitioners assert) the Maryland Court of Appeals. Contrary to petitioners'

contention, their fraud was "in connection with the purchase * * * of [a] security." 17 C.F.R. 240.10b-5(b). The natural and foreseeable result of petitioners' fraudulent misrepresentations was to induce recipients of those misrepresentations to purchase USEC stock, and the occurrence of such purchases directly furthered petitioners' fraudulent scheme. Petitioners are also wrong in arguing that fraud actions are subject to the heightened substantive and procedural protections that apply to limited categories of cases of special First Amendment sensitivity. In any event, this case would be a poor vehicle for review of petitioners' claim of entitlement to these protections since petitioners actually received many of them.

1. The court of appeals correctly held that petitioners' misrepresentations were "in connection with" the purchase or sale of a security. The court based that holding on its determination that petitioners had made their knowingly false statements "with the intent to induce securities transactions" and had directed the misrepresentations "to investors that they knew were likely to rely on them." Pet. App. 41a. The court further explained that purchases of USEC stock by early recipients of the Special Report facilitated petitioners' ongoing fraud by causing the stock's price to rise, an increase that petitioners touted in their subsequent e-mail solicitations. *Id.* at 26a-27a. The court of appeals' determination that petitioners' false statements were made "in connection with" the purchase of a security turned on the particular circumstances of petitioners' fraudulent scheme and does not merit the Court's review.

a. This Court has "explained that [Section 10(b)] should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC* v.

Zandford, 535 U.S. 813, 819 (2002) (internal quotation marks and citation omitted). The Court in *Zandford* observed with evident approval that "the SEC has consistently adopted a broad reading of the phrase 'in connection with the purchase or sale of any security.'" *Ibid.*

In keeping with the broad scope of this phrase, courts have held that "Congress, when it used the phrase 'in connection with the purchase or sale of any security,' intended only that the device employed, whatever it might be, be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities." *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 860 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969); see *id.* at 862 ("Rule 10b-5 is violated whenever assertions are made, as here, in a manner reasonably calculated to influence the investing public * * * if such assertions are false or misleading or are so incomplete as to mislead."). "In such cases, the SEC need only show that the documents are reasonably calculated to influence investors" in order to establish that the statements were made in connection with the purchase or sale of securities. *SEC* v. *Wolfson*, 539 F.3d 1249, 1262 (10th Cir. 2008) (citing *SEC* v. *Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993)); accord *SEC* v. *Savoy Indus., Inc.*, 587 F.2d 1149, 1171 (D.C. Cir. 1978), cert. denied, 440 U.S. 913 (1979) (*Savoy*); *United States* v. *Gruenberg*, 989 F.2d 971, 976 (8th Cir.), cert. denied, 510 U.S. 873 (1993); *United States* v. *Persky*, 520 F.2d 283, 288 (2d Cir. 1975).

The decision of the court of appeals is consistent with this line of authority. The information that petitioners offered to sell was represented to be valuable precisely because it would enable the recipient investors to iden-

tify a publicly-traded security that was likely to appreciate. Petitioners therefore would have "reasonably * * * expected" that their e-mail and special report would cause recipients "to buy * * * securities in reliance thereon." *Savoy*, 587 F.2d at 1171. Indeed, the special report urged investors to "call your broker now and tell him to buy shares of USEC (NYSE: USU, $6.50)." Pet. App. 170a.

b. Petitioners contend (Pet. 16) that they could not be liable because they did not participate in securities transactions themselves or owe a fiduciary duty to the investors they misled. They discuss prior cases (Pet. 16-18) in which one or both of those circumstances were present. Petitioners' reliance on those precedents is misplaced. Depending on the circumstances, securities trades by a defendant or the presence of a fiduciary duty may be sufficient to satisfy the "in connection with" requirement; but the cited decisions do not hold that they are necessary.

As an initial matter, liability under Section 10(b) and Rule 10b-5 is not limited to persons who themselves "participate in securities transactions." Pet. 16. Rule 10b-5 makes it "unlawful for any person * * * [t]o make any untrue statement of a material fact * * * in connection with the purchase or sale of any security," 17 C.F.R. 240.10b-5(b). The Rule does not require that the relevant purchase or sale be made by the same person who makes the untrue statement. See, *e.g.*, *Texas Gulf Sulphur Co.*, 401 F.2d at 860 ("There is no indication that Congress intended that the corporations or persons responsible for the issuance of a misleading statement would not violate the section unless they engaged in related securities transactions.").

Citing *United States* v. *O'Hagan*, 521 U.S. 642 (1997), and *SEC* v. *Zandford*, *supra*, petitioners contend (Pet. 17) that this Court has limited the "in connection with" requirement to "the world of fiduciary duty" when the defendant does not trade securities. The defendants' fiduciary duties were significant in those cases, however, only because both cases involved fraud through nondisclosure. In *O'Hagan*, "[d]eception through nondisclosure [was] central to the theory of liability." 521 U.S. at 654. The deception involved trading on material nonpublic information in breach of a duty of disclosure to the source of the information. *Id.* at 654-655. This deception was "in connection with" the purchase or sale of a security because "the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities," and the "securities transaction and the breach of duty thus coincide." *Id.* at 656.

Similarly in *Zandford*, the deception involved trading without disclosing an intent to misappropriate the proceeds in breach of a fiduciary duty. 535 U.S. at 820-821. This deception was "in connection with" the purchase or sale of a security because the broker sold his client's securities while secretly intending from the outset to keep the proceeds, in breach of his fiduciary duties. Accordingly, "the securities transactions and breaches of fiduciary duties coincide[d]." *Id.* at 825.

This case, by contrast, involves affirmative misrepresentations to potential buyers and sellers of a particular security. Whereas the wrongfulness of nondisclosure in particular circumstances may turn on the presence or absence of a fiduciary duty to disclose, affirmative mis-

representations stand on a different footing. As the Second Circuit has explained,

> *O'Hagan* * * * and *Zandford* * * * stand for the proposition that nondisclosure in breach of a fiduciary duty "satisfies [Section] 10(b)'s requirement . . . [of] a 'deceptive device or contrivance,'" *O'Hagan*, 521 U.S. at 653. However, what is sufficient is not always what is necessary, and none of [those] Supreme Court opinions * * * *require* a fiduciary relationship as an element of an actionable securities claim under Section 10(b). While * * * *O'Hagan* * * * and *Zandford* * * * dealt with fraud *qua* silence, an affirmative misrepresentation is a distinct species of fraud. Even if a person does not have a fiduciary duty to 'disclose or abstain from trading,' there is nonetheless an affirmative obligation in commercial dealings not to mislead.

SEC v. *Dorozkho*, 574 F.3d 42, 49 (2d Cir. 2009) (emphasis in original).

Petitioners also claim (Pet. 19) that the ruling below "conflicts with the Court's repeated efforts, most recently in [*Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (*Stoneridge*)], to prevent the wholesale federalization of common-law fraud through Section 10(b)." *Stoneridge* is inapposite. In that case, the Court "consider[ed] the reach of the private right of action the Court has found implied in [Section] 10(b)" and, specifically, the reliance requirement for such private suits. *Id.* at 152, 159. The Court made clear, however, that it "[did] not evaluate the 'in connection with' requirement of [Section] 10(b)." *Id.* at 160. The Court also found that the defendants' actions were "too remote to satisfy the requirement of reliance" be-

cause those actions were not disclosed to the investing public. *Id.* at 161. Here, by contrast, petitioners themselves directly made the false statements that induced investors to purchase USEC stock. Finally, this case does not present a mere "garden-variety allegation of commercial fraud" (Pet. 18) of the kind discussed in *Stoneridge*. Rather, the essence of the fraud was to misrepresent to investors information that petitioners themselves touted as directly relevant to the purchasing of securities.

c. Contrary to petitioners' contentions, this case does not involve "mere impersonal investment advice" (Pet. 13), and the court of appeals' decision will not enable the SEC or private litigants "to engage in endless second-guessing of editorial judgments made by publishers and market commentators" (Pet. 16). "[T]he actionable false statements in the instant case" were not "merely opinion" (Pet. App. 65a), "commentary" (Pet. 14) (citation omitted), or a "projection[] as to how a major international event would affect a publicly-traded company" (InvestorPlace Media Amicus Br. 5). Rather, "[t]he critical statement" on which petitioners' liability was premised "is the false statement of an alleged existing fact—that is, the asserted past receipt of inside information from a senior USEC executive who would be in a position to know when the pricing agreement would be approved." Pet. App. 64a-65a; see *id.* at 12a n.11.

As explained above, the natural and foreseeable effect of petitioners' false statements of fact was to induce the recipients of those statements to purchase securities. And, as the court of appeals further explained, those purchases "helped [petitioners] to maximize the profitability of their scheme," Pet. App. 29a, since petitioners "used stock purchases by early purchasers of the

USEC Special Report as a way of enhancing the credibility of the report," *id.* at 26a. Petitioners disseminated the Super Insider Tip e-mail "in waves to various groups of investors," and "later versions of the solicitation pointed to a rise in USEC's stock price—which the district court determined was the result of purchases by early recipients of the solicitation and special report—as supporting the trustworthiness of the tip." *Ibid.* The purchases of stock that petitioners induced therefore were not simply a foreseeable consequence of petitioners' false statements; rather, those purchases were essential to the full realization of petitioners' fraudulent scheme.

2. Review of petitioners' First Amendment claim is likewise unwarranted. This case does not involve liability for "disinterested" speech (Pet. 27), and petitioners actually received many of the protections they contend the First Amendment requires. Moreover, the court of appeals' rejection of petitioners' First Amendment claim was correct and does not conflict with any decision of this Court or any other court of appeals.

a. The "First Amendment does not shield fraud." *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (*Madigan*). Petitioners contend that their false statements are nonetheless entitled to First Amendment protection because they constituted "disinterested investment advice." Pet. 22. As explained above, however, petitioners were not found liable for erroneous "advice," *ibid.*, but for knowing misstatements of a historical fact. Pet. App. 12a; see *id.* at 64a-65a. Petitioners' statements also were not "disinterested," since the purchases of USEC stock that their early misstatements induced caused the stock price to

rise, thereby facilitating additional sales of the Special Report. See pp. 13-14, *supra*.[2]

b. Petitioners contend (Pet. 9, 24) that the First Amendment, as interpreted by this Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964) (*New York Times*), required a showing of "actual malice" before they could be found liable. A defendant possesses "actual malice" with respect to a statement if he makes it "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. The district court found that Stansberry knew his statement was false, Pet. App. 78a, so the actual malice requirement was satisfied here.[3] More generally, the scienter required for liability under Rule 10b-5 (see *id.* at 77a-79a) is essentially equivalent to "actual malice" as defined in *New York Times*. The question whether the First Amendment independently requires proof of that mental state in circumstances like these is therefore irrelevant to the disposition of this case and of Rule 10b-5 cases generally.

Petitioners also argue (Pet. 24) that the First Amendment required the SEC to establish the factual predicates to their liability by clear and convincing evi-

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[2] For the same reason, this case does not call for application of the doctrine of constitutional doubt to interpret Section 10(b) as not covering "disinterested investment and financial writing." Pet. 39; see Pet. 35-39.

[3] The district court found that "Stansberry's scienter is imputed to Pirate because he effectively controlled Pirate and made the statements at issue on behalf of Pirate as an agent of Pirate, within the scope of his agency." Pet. App. 78a. In the alternative, the district court found that Pirate "acted with 'reckless disregard for [the] truth or falsity' of the statements." *Id.* at 79a (quoting *Eisenberg* v. *Gagnon*, 766 F.2d 770, 776 (3d Cir.), cert. denied, 474 U.S. 946 (1985)) (brackets in original).

dence. Although the district court did not agree that the clear-and-convincing-evidence standard applied, it found that the government's evidence satisfied it. See Pet. App. 61a ("Nonetheless, the [c]ourt finds that the Commission has, in the instant case, established every element of its charges against * * * Pirate and Stansberry by clear and convincing evidence.") (footnote omitted); see also *id.* at 104a (same). Acceptance of this aspect of petitioners' legal theory therefore would not have affected the outcome of the case.

Finally, petitioners argue that the court of appeals should have conducted an "independent examination" of the district court's factual findings, rather than reviewing for clear error. Pet. 24 (quoting *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984) (*Bose*)). They fail to demonstrate, however, that a different standard of review would have led to a different outcome. Petitioners claim that "[u]nder *Bose*" the court of appeals could not have "presum[ed] [the] material falsity" of the report "based only on a style of writing that offended them and the $1,000 cost of the Report." Pet. 28; see Soc'y of Prof'l Journalists Amicus Br. 16-17. But petitioners declined in the court of appeals to challenge the district court's finding that the relevant statement was false. Pet. App. 10a n.8, 12a. Petitioners cannot credibly challenge the standard of review applied to a claim they did not make.

Petitioners also argue that "independent appellate review" by the court of appeals would have required reversal of the district court's finding of scienter. Pet. 23, 28. The district court found, however, that petitioners' scienter had been "overwhelmingly established." Pet. App. 94a. And because petitioners' false statements of fact involved a matter within Stansberry's recent per-

sonal experience, the likelihood that those statements were made *without* scienter was inherently remote. See *id.* at 20a (court of appeals explains that "Stansberry, having conducted the interview with Wingfield, would have known whether or not Wingfield told him to 'watch the stock on May 22nd'"); cf. *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1796 (2010) ("We recognize that certain statements are such that, to show them false is normally to show scienter as well."). Given petitioners' failure to challenge the district court's finding as to falsity, the court of appeals appropriately found "nothing controversial in drawing the logical conclusion—that Stansberry would know that his claim was false." Pet. App. 20a.

The district court also had the opportunity to view Stansberry's testimony and assess his credibility firsthand. The result was a finding that Stansberry "testified falsely at trial" about his conversation with the USEC executive. Pet. App. 99a; see *id.* at 67a n.9 (calling Stansberry's account of the conversation "preposterous"). Even where the *Rose* independent review requirement otherwise applies, an appellate court's review of the record must give "'due regard' * * * to the trial judge's opportunity to observe the demeanor of the witnesses," 466 U.S. at 499-500 (quoting Fed. R. Civ. P. 52(a)), and must afford "special deference" to the "trial judge's credibility determinations," *id.* at 500. Petitioners fail to explain what basis the court of appeals would have had (under any standard of review) to second-guess the district court's credibility determinations.

c. In any event, petitioners are wrong in contending that special First Amendment rules applicable to defamation claims involving public figures should apply to Section 10(b) actions. As noted above, the "actual malice" standard applied in *New York Times* is functionally

equivalent to the scienter already required in a Section 10(b) case, so there is no need for a special First Amendment rule on that question. Nor is there any basis in the First Amendment or this Court's cases interpreting it to extend the clear-and-convincing-evidence standard of proof or independent appellate review to factual findings in a fraud case.

The Court has acknowledged that the *New York Times* framework for defamation cases involving public persons "exacts a * * * high price from the victims of defamatory falsehood," by making relief unavailable to "many deserving plaintiffs, including some intentionally subjected to injury." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). When those victims are public officials or public figures, the Court has concluded that this price is worth paying because such people have "invite[d] attention and comment" by seeking office or "thrust[ing] themselves to the forefront of particular public controversies." *Id.* at 344-345. The Court has struck a different balance, however, when the alleged victim is not within those limited categories. An individual who is neither a public figure nor a public official "has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Id.* at 345; see *Bose*, 466 U.S. at 492 & n.8 (noting that corporate plaintiff's status as "public figure" was predicate for application of *New York Times* protections). The requirement of actual malice proved by clear and convincing evidence thus does not apply in defamation actions brought by such plaintiffs. *Gertz*, 418 U.S. at 347. Similarly, although this Court has suggested that an appellate court "could" review a fraud finding independently "[a]s an additional

safeguard," *Madigan*, 538 U.S. at 621, the Court has never held that such review is required.

Petitioners cite (Pet. 24-25) several court of appeals decisions imposing *New York Times*-type requirements in cases involving the expression of an editorial opinion or alleged reputational harm. Those decisions are inapposite here. Although petitioners highlight two such cases that "specifically involved speech about securities" (Pet. 25), neither case concerned false factual statements. *Compuware Corp.* v. *Moody's Investors Services, Inc.*, 499 F.3d 520 (6th Cir. 2007), involved "a backdoor attempt to recover damages for the harm allegedly caused [to a company's reputation] by Moody's protected expression of its opinion of Compuware's financial condition." *Id.* at 531. *Jefferson County School District No. R-1* v. *Moody's Investor's Services, Inc.*, 175 F.3d 848 (10th Cir. 1999), also involved "the expression of an opinion protected by the First Amendment." *Id.* at 856-858. This case, by contrast, involves a misstatement of fact that induced stock purchases by investors rather than an expression of opinion that harmed reputations.

d. Contrary to petitioners' contention (Pet. 13, 20-21), the court of appeals' decision in this case does not conflict with the decision of the Maryland Court of Appeals in *Lubin* v. *Agora, Inc.*, Pet. App. 117a-150a. In that case, the Maryland Court of Appeals held that Agora, Pirate's parent company, could not be required "to disclose the identities of those who subscribe to or purchase its materials," such as the Super Insider Tip and USEC Special Report. *Id.* at 143a. The court explained that information concerning the identities of subscribers and other purchasers fell "within the protective umbrella of the First Amendment," and that com-

pelled disclosure of that information would "destroy the anonymity that the Supreme Court has recognized as important to the unfettered exercise of First Amendment freedoms." *Ibid.* While recognizing that the Report might "have been fabricated," the court concluded that this possibility did not justify compelled disclosure of the requested information because the Report's "falsity would not diminish the purchasers' interests in anonymity." *Id.* at 148a.

The Maryland Court of Appeals explicitly distinguished, however, between government regulation of commercial speech and First Amendment rights to receive such speech anonymously. Pet. App. 148 n.12. The court recognized that commercial speech "enjoys a lower level of protection when it is true, and no protection at all when it is false or misleading." *Id.* at 144a. The court did not suggest that the First Amendment would preclude government officials from seeking appropriate sanctions if the e-mail tips or the USEC Special Report were found to contain false statements. To the contrary, the court observed that "the [Maryland Securities] Commissioner has the Report and can evaluate the statements made therein without requiring Agora to reveal the identities of the purchasers." *Id.* at 148a.

In the instant case, by contrast, the court of appeals did not address the First Amendment interests in anonymity of the recipients of the Super Insider Tip and USEC Special Report. Rather, the court of appeals addressed whether "the Super Insider Tip E-mail and USEC Special Report constitute speech entitled to some measure of First Amendment protection," and held that punishing fraudulent speech "simply does not violate the First Amendment." Pet. App. 48a-49a. The decision of

the Maryland Court of Appeals in *Agora* is entirely consistent with this holding.

3. Finally, petitioners are wrong in contending that the court of appeals' affirmance of the injunction against future violations of Section 10(b) and Rule 10b-5 violated the First Amendment. Pet. 30. Since petitioners have no First Amendment right to engage in securities fraud, they have no First Amendment right to be free of an injunction barring them from doing so again. Pet. App. 50a; see *United States* v. *Bell*, 414 F.3d 474, 481 (3d Cir. 2005) ("[T]he general principle of First Amendment law that prior restraints, as opposed to criminal penalization, bear a heavier presumption against their constitutional validity * * * does not apply to restrictions on unprotected speech, including false or unlawful commercial speech.").

The type of conduct covered by the injunction in this case distinguishes it from those invalidated as prior restraints in the cases petitioners cite (Pet. 35). *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), all involved "prior restraints on [charitable] solicitation when fundraising fees exceeded a specified reasonable level." *Madigan*, 538 U.S. at 612. This Court has found a critical constitutional difference between such "broad prophylactic rule[s]" categorically limiting speech and "a properly tailored fraud action targeting fraudulent representations themselves." *Id.* at 619 (alterations and citation omitted). *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam), involved a state statute that was "procedurally deficient," *id.* at 317, because it "authorize[d] prior re-

straints of indefinite duration on the exhibition of motion pictures that ha[d] not been finally adjudicated to be obscene," *id.* at 316. And *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931), involved a prior restraint on a "malicious, scandalous and defamatory newspaper, magazine, or other periodical." *Id.* at 701-702. None of these cases involved an injunction limited to fraudulent speech that violates a valid substantive prohibition. Cf. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 380-381, 389-390 (1973) (rejecting contention that an order barring, with certain exceptions, "all reference to sex in employment advertising column headings" "should be condemned as a prior restraint on expression" because the order, which concerned illegal sex discrimination in employment, did "not endanger arguably protected speech").

Lowe v. *SEC*, 472 U.S. 181 (1985), also does not support petitioners' argument. Petitioners contend that the Commission "is attempting, as it did in *Lowe*, to regulate pure speech in violation of *Near*'s rule against prior restraints." Pet. 36. In *Lowe* the Court addressed the question whether the publishers of an investment newsletter could be "permanently enjoined from publishing nonpersonalized investment advice and commentary in securities newsletters because they [were] not registered as investment advisers under [Section] 203(c) of the Investment Advisers Act of 1940." 472 U.S. at 183 (citing 15 U.S.C. 80b-3(c)). The Court held that there was no "justification for restraining the future publication of [petitioners'] newsletters" because the newsletters were "bona fide" publications, there was "no suggestion that they contained any false or misleading information, or that they were designed to tout any security in which petitioners had an interest," and the publi-

cations were "of general and regular circulation" in that there was "no indication that they ha[d] been timed to specific market activity, or to events affecting or having the ability to affect the securities industry." *Id.* at 209, 211.

None of those factors is present here. Petitioners did not make the statements that violated Section 10(b) in a bona fide publication "of general and regular circulation," they did not provide only truthful information, and their communications were not unrelated to specific market activity. Rather, petitioners made false statements in an e-mail targeted to investors that induced investors to purchase and sell USEC stock by falsely claiming to have insider information about the company.

Finally, this case would present a poor vehicle for considering whether an injunction of this sort violates the First Amendment because petitioners forfeited a logically antecedent non-constitutional challenge to the injunction. Petitioners criticize the injunction for "simply repeat[ing] the language of Rule 10b-5(a)" and for not being specific enough to permit them to "ascertain" what it covers. Pet. 29, 33; see InvestorPlace Media Amicus Br. 8 n.2. As the court of appeals explained, however, petitioners forfeited the argument that, under Federal Rule of Civil Procedure 65(d), the injunction is an overly general "'obey the law' injunction" by failing to raise that challenge until their court of appeals reply brief. Pet. App. 50a n.23.

In a case where all issues had been preserved, the Court could first address the application of Rule 65(d) before, if necessary, considering the First Amendment. See *Jean* v. *Nelson*, 472 U.S. 846, 854 (1985) ("[I]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [the

Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.") (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)). Petitioners should not be permitted to circumvent that normal sequence of decisionmaking (and render a constitutional decision "unavoidable," *ibid.* (citation omitted)) by forfeiting a possible nonconstitutional ground for relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 09-1176

IN THE
Supreme Court of the United States

PIRATE INVESTOR LLC AND FRANK PORTER STANSBERRY,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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A. The punishment and enjoining of disinterested speech about the financial markets is an issue of far-reaching impact and critical significance that led the court of appeals to stay its mandate and warrants this Court's review.

The government attempts to justify an unprecedented prospective injunction on disinterested financial speech by basing liability under Section 10(b) on the premise that publishers enhance their reputations every time they publish facts or predictions that turn out to be true. This new theory of "reputational gain" as a predicate for a vast expansion of the SEC's jurisdiction into the publishing world was created by the court of appeals out of necessity when an admission by the government at oral argument left it bereft of any other theory of liability. No legal or factual authority exists for this new theory, and it conflicts with a long-standing theme in the First Amendment jurisprudence of this Court. As the numerous *amici* supporting certiorari attest, the single statement in an investment newsletter that serves as a basis for a sweeping injunction cannot be distinguished from the content of hundreds of mainstream publications which thousands of times a day deliver facts and insights about public companies. The "natural and foreseeable result" of those publications is that readers will act on the information and possibly "purchase ... stock." BIO 8. Under the government's theory, the more that readers reward a publisher reputationally with their loyalty over time and rely on its publications to make investment decisions, the more certain the publisher now falls under Section 10(b). Pet. 20. It would be a perverse result under

the Constitution to permit the ordinary operation of the marketplace of ideas to serve as a substitute for the statutory nexus Congress and this Court have always required for liability under the federal securities laws.

1. There is no merit to the government's contention that existing precedent supports the imposition of Section 10(b) liability on a speaker who neither trades in the relevant security nor bears a fiduciary duty to an investor who trades. Though disinterested speech may "affect" securities trading, it does not satisfy the statutory requirement that a covered statement must be made "in connection with" securities trading. Before the ruling in this case, the lower courts had followed this Court's direction to hew rigorously to the statutory text of the securities laws, including in order to protect the free speech interests that the ruling so significantly undercuts.

"When a disinterested publisher sells non-personalized investment advice, the transaction is complete regardless whether any securities are actually bought or sold." Brief of InvestorPlace Media, LLC, et al. 18. To meet the "in connection with" requirement, however, an alleged fraud based on a false statement must "require" securities trading or be "consummated" by it. *SEC v. Zandford*, 535 U.S. 813, 820-21 (2002); *U.S. v. O'Hagan*, 521 U.S. 642, 655-56 (1997); Pet. 9, 16-17. Section 10(b) thus does not apply to disinterested publishers, who are instead covered by common-law principles of fraud subject to the protections of the First Amendment.

The government attempts to brush away the statutory limitations established in *O'Hagan* and *Zandford* by arguing that in those cases the fraud was perpetuated by "nondisclosure" and this case consists of an "affirmative misrepresentation." BIO 11-12. But the same statutory text applies in both instances, and neither law nor logic supports exempting a misrepresentation from the requirement that the government prove either a breach of duty or trading by the defendant.

This long-understood reading respects both statutory and constitutional interests and is the only reading that is consistent with *Lowe v. SEC*, 472 U.S. 181 (1985), which employed the canon of constitutional avoidance to remove disinterested speech from the reach of federal securities regulation. This Court understood that readers would purchase or sell securities based on the advice in Lowe's newsletters, but it still read these publications out of the Investment Advisers Act because they did not provide information in the context of a fiduciary relationship and regulating them with prior restraints would thus create constitutional concerns.

The government argues to the contrary only by taking language from inapposite cases out of context. BIO 9, 12. According to respondent, courts deem it sufficient that "[t]he natural and foreseeable effect of petitioners' false statements of fact was to induce the recipients of those statements to purchase securities." BIO 13. That cannot be correct, because it would apply fully to the assertion that a report in any of the newspapers, broadcasts, books, cable shows, and

Internet sites disseminated daily by *amici* and other publishers contained a false statement of fact.

In reality, the government cites no case in which the "in connection with" requirement was satisfied when the defendant had neither traded securities nor breached a fiduciary duty. In *SEC v. Dorozkho*, 574 F.3d 42 (2d Cir. 2009), BIO 12, the defendant made misrepresentations to gain access to a computer network to purloin information that he used to trade securities. In *SEC v. Texas Gulf Sulphur*, 401 F.2d 833 (2d Cir. 1968), BIO 9-10, the "in connection with" element was met by the party's fiduciary breach, not its trading. In *all* of the cases respondent cites applying the *Texas Gulf* standard of a statement that would "cause reasonable investors to rely thereon," BIO 9, the defendants traded stocks or carried duties.

2. The government is left with the erroneous claim that this case can be distinguished because supposedly "purchases of USEC stock by early recipients of the Special Report facilitated petitioners' ongoing fraud by causing the stock's price to rise, an increase that petitioners touted in their subsequent e-mail solicitations." BIO 8.

The ruling below bullies past the record and all the statutory and constitutional authority in its way to reach the untenable premise that petitioners may be sued under Section 10(b) because they secured a "reputational gain" from their readers' stock trading. App. 29a. The complaint in this case never contended petitioners' initial publication of the Report was intended to spur, or in fact did spur, later

sales by increasing the price of USEC stock. The government put on no such proof. The district court made no such finding. The government did not argue "reputational gain" on appeal.[1] It was invented by the court of appeals after respondent admitted at oral argument that petitioners received no benefit from the securities trading of their readers. Pet. 15. In the face of this concession, the court of appeals created the "reputational gain" theory to supply the benefit from securities trading the government acknowledged did not exist.

No court has ever expanded Section 10(b) liability to statements by disinterested publishers that enhance reputation and future revenues. The case on which the court of appeals relied, *Rowinski v. Salomon Smith Barney*, 398 F.3d 294 (3d Cir. 2005), App. 27a-29a, is so wildly inapposite that the government does not even bother to cite it to this Court. If respondent's view is accepted, then all publishers of impersonal financial news and investment advice whose circulation has grown because they have published credible information in the past will also no longer be "disinterested" and will therefore be equally subject to SEC investigations into their editorial work and Section 10(b) enforcement actions and private suits. The theory of "reputational gain" offends the Constitution and must be rejected as have other similar pretexts for regulating speech. *See Harte-Hanks Commc'ns v.*

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[1] Respondent had a different theory then: that disinterested speech could be regulated if it was a "virtual certainty" that readers would trade based on it. No court has ever applied this theory under Section 10(b) either.

Connaughton, 491 U.S. 657, 667 (1989) ("If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.").

In addition, the court of appeals' theory is refuted by the evidence. Petitioners published the E-mail and the Report on May 13, 2002. The next morning, when they saw that the Report was popular among readers, they decided to offer it for republication to other editors at their parent company through a sharing of subscriber lists that is common in the publishing industry. App. 180a-181a. The notion that petitioners deliberately staggered the Report's publication so that different waves of readers would buy it (and USEC stock) on different days is unfounded and uninformed. Later in the week, as the price of USEC stock was unsurprisingly rising with media coverage of the approaching summit, petitioners revised the E-mail, as any publisher would, to keep it current and accurate. As Porter Stansberry wrote to a copy editor: "Please make sure that you *update* USEC in the weekend Blast that you send out. The stock will probably be near $9.00."

Contrary to the reasoning of the court of appeals, App. 26a-27a, the fact that petitioners pointed out to readers that the stock price had already increased could have made subsequent sales of the Report *less* likely, not *more*, as readers may have believed that the market had already incorporated the information and the opportunity for investing had past. The assertion that stock purchases "were necessary to

complete [petitioners'] fraudulent scheme," App. 41a, is thus nothing more than baseless speculation unsupported by any factual findings or the record. The first publication of the Report could not have been "in connection with" securities trading because petitioners had not yet established their "reputation" from the increase in the stock price. Equally essential to the court of appeals' theory is that the Report remained "material" for a week and a half as different groups of readers purchased it. But the securities expert, Pet. 10, confirmed at trial that material information about a NYSE-listed company such as USEC trading in an efficient market would have been absorbed within a day. Analyzed from any angle, the "reputational gain" theory collapses.

B. Certiorari is warranted because the decision below squarely presents conflicts under the First Amendment with decisions of this Court, other federal courts of appeal, and the Maryland Court of Appeals.

1. The government contends that "many" First Amendment protections were extended to petitioners, BIO 8, 14, as if constitutional rights were luxuries the government is permitted to dole out piece by piece as it sees fit. In fact, *none* of the necessary protections were provided.

The actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964) was expressly rejected by the district court. App. 83a-87a. Since actual malice is an "elusive constitutional standard[]," *Harte-Hanks*, 491 U.S. at 686, whose meaning has only been developed "through the process of case-by-

case adjudication," *Bose v. Consumers Union*, 466 U.S. 485, 503 (1984), the district court's assertion that it applied a clear-and-convincing test to Section 10(b)'s *statutory* scienter element did not serve as a substitute for the *constitutional* requirements of *New York Times*. The court of appeals denied petitioners independent, *de novo* review of the entire record under *Bose*. App. 18a-19a. It reviewed only for clear error using a preponderance-of-the-evidence test in which it ignored all of the evidence negating falsity and fault.

Indeed, this lack of *de novo* review led the court of appeals to err in suggesting that petitioners had failed to raise the truth of their publications on appeal. (The government opportunistically pounces on this gift and claims now that petitioners did not contest falsity on appeal even though it never made such a claim below.) Nothing could be further from the truth. Petitioners' brief quoted federal appellate precedent that courts applying *Bose* must be "left with no apprehension on the issue of falsity" and included a section with the heading that respondent had "failed to prove, by clear and convincing evidence, that the Publisher and Author published materially-false statements with actual malice." Brief for Appellants 37, 40 (4th Cir. May 13, 2008). Furthermore, at oral argument, counsel for petitioners stated, "Under Bose review ... the Court would find that whether it looks at the falsity component or the fault or scienter component, that there's not clear and convincing evidence of any false statement. ... [E]ven if it accepted the District Court's finding of falsity, that the statement 'watch

the stock' was not made to the reporter ... [that is not] enough for actual malice." Dec. 2, 2008 Tr. 24:10-26:2.

The government asks on what basis the court of appeals would have had to "second-guess" the district court and reverse under *Bose*, BIO 17, but like the court of appeals the government simply ignores the contemporaneous state-of-mind evidence showing Stansberry's steadfast belief in the accuracy of the Report and Steven Wingfield's lack of any effort to correct it. Pet. 7-8, 28. As in *Bose* itself, the path to reversal does not require revisiting the credibility determinations of the district court but lies in the lack of clear and convincing evidence supporting the inferences it drew. Even if Stansberry was mistaken by believing that, like the defendant in *Bose*, he "knew what he heard," where his possible "misconception" of Wingfield's final words in an otherwise undisputed hour-long conversation is the "only evidence of actual malice on which the District Court relied," respondent has failed to prove fault with convincing clarity. 466 U.S. at 512-13.[2]

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[2] The government tries to draw a tidy line between speech that "harm[]s reputation" and speech that "induce[s] stock purchases," BIO 19, and therefore misses the point of the end-run the court of appeals has created around existing First Amendment law. Pet. 27-28. Some speech does *both* – for example, a critical newspaper report on a public company that hurts its brand *and* leads readers to sell its shares. Under the ruling below, this report is entitled to no constitutional defenses if challenged under Section 10(b), while actual malice would be applied under defamation law.

2. The government errs in attempting to salvage the injunction by citing *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 619 (2003) for the proposition that "properly tailored fraud actions" are distinct from the "broad prophylactic rule[s]" regarding fraudulent speech that this Court has repeatedly struck down. BIO 21. *Telemarketing Assocs.* does not support the injunction here – it only addressed standards for liability in common-law fraud actions and did not consider injunctive relief.

Respondent does not try to distinguish *Schneider v. State*, 308 U.S. 147 (1939), Pet. 21, 34, which supplies the authority that the government claims is lacking for a case where a provision regulating fraudulent speech is "valid" in substance but rejected because it establishes a prior restraint over the same subject matter. BIO 22. If the statute in *Vance v. Universal Amusement*, 445 U.S. 308, 316 (1980) was "procedurally deficient" as the government concedes, BIO 21, then so is Section 10(b), as it has been used here to "authorize[] prior restraints of indefinite duration on [disinterested speech regarding securities] that ha[s] not been finally adjudicated to be [fraudulent]." The suppression of speech before it is found to be unprotected is the special vice of *all* prior restraints as the government recognized in its brief in *Lowe*, Pet. 32, but which it now ignores when it tries to limit *Lowe* to its facts. BIO 22-23. Arguing that petitioners are not entitled to protections from prior restraints unless they qualify for the particular exemption under the Investment Advisers Act springs from the same faulty reasoning that declares *Near v. Minnesota*, 283 U.S. 697, 701 (1931)

irrelevant to the injunction here because the prior restraint in *Near* only targeted "malicious, scandalous, and defamatory" speech, not allegedly fraudulent speech. BIO 22.

The injunction permitted in *United States v. Bell*, 414 F.3d 474, 481 (3d Cir. 2005), BIO 21, prohibited publication of specific commercial speech previously found unprotected. Similarly, *Pittsburgh Press v. Pittsburgh Comm'n on Human Rel.*, 413 U.S. 376, 390 (1973), BIO 22, enjoined an ongoing advertising practice already deemed in violation of state law and did not proscribe *any* speech "before [a] final determination that [it was] unprotected." In contrast, the injunction in this case reaches *all* of the future speech of petitioners, *none* of which has been held to be unprotected.

3. The sweeping injunction is yet another reason why the government is mistaken that *Lubin v. Agora*, 882 A.2d 833 (Md. 2005), presents no conflict with this case. In *Lubin*, the Maryland court held that the Report (and petitioners' newsletters) could *not* be classified as commercial speech with less than full constitutional protections. App. 144a, 147a-148a. The district court, on the other hand, found that the Report (and the E-mail) *were* commercial speech and on that basis imposed liability and enjoined petitioners without applying any First Amendment defenses. App. 85a. Petitioners must assume in any future contempt proceeding in federal court that their speech will be classified as commercial speech and receive no constitutional protections, thus chilling expression the Maryland Court of Appeals placed *outside* of the commercial speech doctrine.

C. All legal and factual issues are preserved.

This case is an ideal vehicle for addressing the statutory and constitutional questions because the relevant issues were all raised below.

The controlling facts governing the "in connection with" requirement – that petitioners did not trade USEC shares or owe fiduciary duties to investors who did trade – were stipulated before trial. Brief for Appellants 8. Petitioners objected to the lack of actual malice protections at trial and sought independent appellate review over the entire record on the questions of both falsity and fault. *Supra* 8-9. They also raised constitutional defenses to the injunction. Brief for Appellants 55-57.

There is no merit to the government's contention that a constitutional challenge to an injunction is only properly presented if a determination has been made that the injunction is appropriate under Rule 65(d). The court of appeals established no such bar, and the constitutionality of the injunction having been both pressed and passed on below is ripe for review.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition and supporting *amici* briefs, the petition for a writ of certiorari should be granted.

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UNITED STATES SECURITIES AND
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae include publishers and operators of major national newspapers, magazines, broadcast stations, cable networks, newsletters, and Internet sites, as well as two associations. *Amici* publish commentary, financial news, and investment analysis, including disinterested analysis of the performance of public companies and marketable securities. Their publications increase public access to and awareness of information relating to individual companies and broad market trends. Although *amici* do not tailor their publications to provide specific advice to individual investors, *amici* nonetheless expect that individual investors will often rely on information *amici* publish when making investment decisions. *Amici* are listed individually in an appendix to this brief.

Amici appear in support of Petitioners because they are concerned that the decision below expands the scope of Section 10(b) of the Securities Exchange Act of 1934 so greatly that it will undermine their ability to continue providing the public with disinterested analysis of public companies. If disinterested publishers like *amici* can be subject to federal liability for securities fraud based on errors in their

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for Petitioners and Respondent received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief and have consented to its filing in letters on file with the Clerk's office.

reporting, without such protections as the requirement that "actual malice" be established by clear and convincing evidence, *amici* may be chilled from publishing future financial reports and investment analysis. *Amici* thus have a vital interest in this Court's decision whether to grant certiorari and reverse the decision below.

SUMMARY OF ARGUMENT

Review is warranted because the court of appeals' expansive interpretation of Section 10(b) of the Securities Exchange Act of 1934 conflicts with this Court's cases establishing the "cardinal principle" that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499-501, 504 (1979)).

In refusing to apply the canon of constitutional avoidance, the court of appeals made two fundamental errors regarding the First Amendment and Section 10(b) that cannot be reconciled with this Court's cases. First, the court of appeals erred in holding that an allegation of "fraud" renders the First Amendment inapplicable. Pet. App. 48a-49a. Compounding that error, the court of appeals concluded that Section 10(b) is not susceptible of any narrower construction, even though not only a possible reading, but the *better* reading of Section 10(b), is that it does not extend to disinterested publishers in the absence of a sufficient nexus between the alleged fraud and the purchase or sale of a security, such as those identified in this Court's Section 10(b) cases.

As a result, instead of interpreting Section 10(b) to avoid serious constitutional questions, the court of appeals improperly weakened the protections of the First Amendment to accommodate an unnecessarily expansive reading of the statute. See Pet. App. 17a-19a, 41a-49a. The result is that disinterested publishers of financial information—the regulation of whom this Court has held raises "First Amendment concerns," *Lowe* v. *SEC*, 472 U.S. 181, 204 (1985)—now are subject to liability under the federal securities laws without the necessary safeguards afforded by the First Amendment. See Pet. App. 48a-49a. Indeed, in the decision below, the court of appeals affirmed an injunction precluding Petitioners from engaging in speech that later could be deemed to violate the requirements of Section 10(b).

This Court should grant review to ensure that disinterested publishers have sufficient "breathing space" so that their publication of information about the public securities markets is not subject to liability under Section 10(b).

ARGUMENT

I. THE DECISION BELOW AFFIRMING LIABILITY UNDER SECTION 10(b) AGAINST A DISINTERESTED PUBLISHER RAISES SIGNIFICANT QUESTIONS UNDER THE FIRST AMENDMENT.

Under the First Amendment, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. That bedrock guarantee has been interpreted by this Court to ensure that speech is afforded sufficient "'breathing space' essential to [its] fruitful exercise." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). As

relevant here, the Court has explained that "[t]he threat of sanctions may deter the[ ] exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions." *Button*, 371 U.S. at 433. That is, "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972).

1. Contrary to the decision below, Pet. App. 48a-49a, publication of financial information by a disinterested publisher implicates the protections of the First Amendment. Specifically, the disinterested publisher of financial information in this case was not a party to any securities transaction and owes no fiduciary duty to the issuer, purchaser, or seller of the security. Such a party may not be found liable for the exercise of its rights under the First Amendment without the benefit of the fundamental protections recognized under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and other cases.

This Court previously recognized that the First Amendment is implicated when disinterested publishers provide information about publicly traded securities. Thus, the Court has reasoned that "because we have squarely held that the expression of opinion about a commercial product . . . is protected by the First Amendment, it is difficult to see why the expression of an opinion about a marketable security should not also be protected." *Lowe*, 472 U.S. at 210 n.58 (citation omitted). As the district court in that same case noted, "[f]inancial news and analysis is persistently flavored with projected consequences of political events and both may form the predicate for particular investment advice." *SEC* v. *Lowe*, 556 F.

Supp. 1359, 1367 (E.D.N.Y. 1983). The speech at issue in this case, which involves projections as to how a major international event would affect a publicly-traded company, is a prime example of speech presumptively protected by the First Amendment. Indeed, the *Lowe* Court explained that Congress, when it exempted financial publications of general circulation from the registration requirement otherwise applicable to "investment adviser[s]" was "plainly sensitive to First Amendment concerns." 472 U.S. at 204.

To provide protected speech with the requisite "breathing space," this Court has mandated that significant protections be employed to ensure that First Amendment rights are not deterred or chilled. Thus, in *New York Times* v. *Sullivan*, this Court recognized a "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'" 376 U.S. at 279-80. That showing must be made by clear and convincing evidence, both at summary judgment and during trial, see *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), and is subject to independent appellate review, *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 505, 513 (1984).

As this Court has explained, "[a]though the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate[,] . . . [a]nd punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz*, 418 U.S. at 340. These protections are necessary (even when speech is alleged to be false) because "[t]he First Amendment

requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341.

Here, the court of appeals' imposition of liability under Section 10(b) without First Amendment safeguards raises serious constitutional concerns under this Court's First Amendment precedent. Specifically, the "actual malice" standard set forth in *New York Times* applies equally to other causes of action that the Court has concluded threaten to deny private parties the "'breathing space'" necessary to support First Amendment principles. See *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 56 (1988) (suits by public figures for intentional infliction of emotional distress); *Time, Inc.* v. *Hill*, 385 U.S. 374, 390-91 (1967) (suits for false-light invasion of privacy). Application of those protections to actions under Section 10(b) against disinterested publishers is likewise necessary because in order "to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968).

2. Although "the First Amendment does not shield fraud," *Illinois ex rel. Madigan* v. *Telemktg. Assocs.*, 538 U.S. 600, 612 (2003), it is likewise accepted that "labeling an action one for 'fraud,' of course, will not carry the day." *Id.* at 617. To be sure, the First Amendment does not provide a "blanket exemption from fraud liability" in all circumstances, but it does impose "proof requirements" that are necessary "to provide sufficient breathing room for protected speech." *Id.* at 620-21. As a result, false statements about a public official, though themselves not valuable, are afforded the protection of a heightened standard of proof to ensure that protected

speech is not chilled. *N.Y. Times*, 376 U.S. at 271-72. These principles apply as well to claims under Section 10(b) to ensure that disinterested speech about the markets is not chilled.

For example, in *Telemarketing Associates*, this Court held that although charitable solicitation is entitled to First Amendment protections, an Illinois statute that prohibited fundraisers from making affirmative false statements about how the money would be used did not "impermissibly chill protected speech." 538 U.S. at 619. In so doing, the Court explained that the conduct at issue fell within a "solid core" of fraud actions not prohibited by the First Amendment because, under the Illinois law, (i) a "[f]alse statement alone does not subject a fundraiser to fraud liability"; (ii) "the State bears the full burden of proof" to establish its case "by clear and convincing evidence," and (iii) the State further must show "the defendant made the representation with the intent to mislead the listener, and succeeded in doing so." *Id.* at 620. Moreover, the Court reserved judgment on the question whether a fraud action against charitable solicitors would violate the First Amendment if a finding resembling "'actual malice'" were not required. *Id.* at 621 n.10.

The court of appeals below was presented with the analogous question whether, absent these First Amendment protections, an action under Section 10(b) against disinterested publishers relating to opinions about the markets raises significant questions under the First Amendment. The court of appeals concluded that the First Amendment was irrelevant simply because the underlying claim was for "actual fraud." Pet. App. 49a. That analysis, however, is contrary to this Court's cases which explain that First Amendment protections apply even

in cases where the speech at issue is alleged to be inaccurate or even false.

3. These same constitutional concerns apply with even *greater* force here because the court of appeals allowed the government to obtain an injunction barring Petitioners from "violating, directly or indirectly, Section 10(b) . . . and Rule 10b-5." Pet. App. 115a-116a. Although this injunction may track the statutory prohibition, "[t]he presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558-59 (1975). Thus, "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Org. for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971). See also *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) (It is "the essence of censorship" for the government to impose *ex ante* restraints that force a publisher "to satisfy the judge that the [published material is] true and [is] published with good motives.").

The court of appeals found that the injunction here overcame this "heavy presumption" because it "only enjoins [Petitioners] from engaging in securities fraud, which . . . is unprotected speech." Pet. App. 50a. But the injunction impermissibly leaves it for Petitioners to guess what conduct falls within its scope, as the order prohibits unspecified future speech that no court has yet determined to be fraudulent.[2] See *Vance* v. *Universal Amusement Co.*,

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[2] This problem is compounded by the indeterminate breadth of the injunction, which prohibits Petitioners, upon penalty of contempt, from violating a statute that the court of appeals held

445 U.S. 308, 316 (1980) (per curiam) (invalidating statute that "authorizes prior restraints of indefinite duration on the exhibition of motion pictures that *have not been finally adjudicated* to be obscene" (emphasis added)); compare *Kingsley Books, Inc.* v. *Brown* 354 U.S. 436, 437 (1957) (upholding state law authorizing a "'limited injunctive remedy'" prohibiting "the sale and distribution of written and printed matter found *after due trial* to be obscene" (emphasis added)). This injunction runs a grave risk of chilling permitted speech, as "the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions*, 420 U.S. at 559. Indeed, the potential damage is "particularly great" in this case because "the prior restraint falls upon the communication of news and commentary on current events." *Neb. Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976).

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REFLECTING THE LIMITED SCOPE OF SECTION 10(b).

The Fourth Circuit's expansion of Section 10(b) to extend to disinterested publishers of impersonal investment advice is inconsistent with the limitations on liability that this Court has recognized in its cases interpreting Section 10(b).

Section 10(b) makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive

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to require application of a multi-factored test to determine its coverage. *See* Pet. App. 21a-47a. Even when the First Amendment has not been implicated, this Court has held such "obey the law" injunctions to be impermissibly broad. *E.g.*, *NLRB* v. *Express Publ'g Co.*, 312 U.S. 426, 435-36 (1941); *N.Y., New Haven & Hartford R.R.* v. *ICC*, 200 U.S. 361, 404 (1906).

device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j(b).[3] The Court has cautioned that Section 10(b) should not be construed so broadly to transform every common law fraud claim into a Section 10(b) violation. See *Marine Bank* v. *Weaver*, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud"). Thus, as explained in *Chiarella* v. *United States*, 445 U.S. 222 (1980), "not every instance of financial unfairness constitutes fraudulent activity under § 10(b)." *Id.* at 232. Rather, Section 10(b) should not be read "'more broadly than its language and the statutory scheme reasonably permit.'" *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979). Although Section 10(b) should be "'flexibly'" construed, see *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972), its scope has been limited repeatedly by this Court. See *Cent. Bank of Denver* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994).

1. In *Chiarella* v. *United States*, 445 U.S. 222 (1980), an employee of a New York financial printer deduced the identity of corporate takeover targets from the confidential offering documents prepared by his firm. *Id.* at 224. He subsequently purchased stock in the target companies and sold the shares at a considerable profit immediately after the public announcement of the takeovers. *Id.* The Court

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[3] Rule 10b-5 implements Section 10(b) and forbids the use, "in connection with the purchase or sale of any security," of "any device, scheme or artifice to defraud" or any other "act, practice, or course of business" that operates as fraud or deceit. 17 C.F.R. § 240.10b-5 (2000). Rule 10b-5 encompasses only conduct that is already prohibited under Section 10(b). *United States* v. *O'Hagan*, 521 U.S. 642, 651 (1997).

reasoned that he had not received any confidential information from the target companies, had no prior dealings with them, was neither a fiduciary nor their agent, and was not a corporate insider. *Id.* at 232. The Court rejected a general duty of all participants in market transactions to forgo actions based on material, nonpublic information, finding that such a broad duty "departs radically from the established doctrine that duty arises from a specific relationship between two parties." *Id.* at 233.

Similarly, in *Dirks* v. *SEC*, 463 U.S. 646 (1983), the Court declined to impose Section 10(b) liability absent a finding of a specific relationship between the parties. The issue in *Dirks* was whether a person had a fiduciary duty to shareholders when he had not personally traded based on material non-public information, but had simply conveyed the information to others. The defendant, an officer of a securities broker dealer, had been informed by a corporate insider that the corporation's assets were vastly overstated due to fraudulent practices. *Id.* at 649. The defendant discussed what he had learned with several investors, some of whom sold their securities in the corporation. *Id.* The price of the corporation's stock fell, and the SEC charged the defendant with aiding and abetting by repeating the fraud allegations to members of the investment community. *Id.* at 650-51.

Citing *Chiarella*, the Court reaffirmed that the duty to disclose under Section 10(b) arises from the existence of a fiduciary relationship. *Id.* at 654. The Court determined that the tippee could not be held liable for securities fraud simply because he helped others to trade in securities based on material, nonpublic information. *Id.* at 655. Unlike corporate insiders, who have an independent fiduciary

relationship to both the corporation and its shareholders, the Court reasoned that the petitioner here was a "stranger" to the corporation who derived no personal benefit from whether or not the investors sold their stock. *Id.* at 665-67. The Court explained that extending liability to tippees who had no fiduciary duty would "have no limiting principle." *Id.* at 664.

2. The Court also has imposed limitations on Section 10(b) liability based on whether an individual has purchased or sold securities. Thus, in *United States* v. *O'Hagan*, 521 U.S. 642 (1997), a partner at a law firm misappropriated information regarding a firm client who was considering a potential tender offer for Pillsbury Company's common stock. The partner reaped a substantial profit after he purchased Pillsbury securities, and then sold his stock once the company announced its tender offer. The Court held that the partner was liable under Section 10(b), noting that "it [is O'Hagan's] failure to disclose *his personal trading* to [his firm], in breach of his duty to do so, that made his conduct 'deceptive' within the meaning of § 10(b)." *Id.* at 660 (emphasis added and alterations omitted). The Court further reasoned that, "the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, *he uses the information to purchase or sell securities.* The securities transaction and the breach of duty thus coincide." *Id.* at 656 (emphasis added). Thus, the Court made clear that liability turned on the petitioner's trading activities.

Similarly, in *SEC* v. *Zandford*, 535 U.S. 813 (2002), the Court held that a broker's sale of a customers' securities with the intent to misappropriate the proceeds constituted fraud in violation of Section

10(b). In *Zandford*, an unscrupulous broker persuaded an elderly client to open a joint investment account for himself and his mentally retarded daughter. *Id.* at 815. The client gave the broker full discretion to manage the account as well as the power of attorney to trade securities without his prior approval. *Id.* It was later discovered that the broker at various times had transferred money from the client's account to his own. *Id.* The Court held that the broker's actions satisfied the requirement that there be a purchase or sale of a security because "a broker *who accepts payment for securities* that he never intends to deliver, or *who sells customer securities* with intent to misappropriate the proceeds," has acted "'in connection with the purchase or sale of any security.'" *Id.* at 819-20. (emphases added). The Court further noted that fraud unattached to any particular purchase or sale—such as outright embezzlement from the client's account—would *not* meet the requirement. *Id.* at 820.

3. Finally, the Court has refrained from imposing Section 10(b) liability on secondary actors whose actions were removed from the securities trading. In *Central Bank of Denver* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Court determined that the text of Section 10(b) made clear that there is no private right of action for aiding and abetting under the statute. *Id.* at 191-92. The Court held that "[i]t is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text." *Id.* at 177. In doing so, the Court expressed concern that broadening the scope of the statute to secondary actors would offer little predictive value in determining liability and would likely result in excessive and "'vexatious[ ]'" litigation. *Id.* at 189.

Most recently, in *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), the Court reaffirmed that Section 10(b) liability could not extend to secondary actors who had not personally participated in securities trading. In *Stoneridge*, the plaintiffs alleged that business partners of Charter Communications violated Section 10(b) by engaging in sham transactions with Charter as well as disregarding Charter's intention to report inflated revenue from these transactions in its public financial statements. *Id.* at 153. Although the business partners knowingly engaged in the underlying fraud, they had no role in preparing or distributing the company's financial statements. *Id.* at 155. The Court refused to extend liability under Section 10(b) to this conduct because "the implied cause of action would reach the whole marketplace in which the issuing company does business; and there is no authority for this rule." *Id.* at 160. The Court cautioned that Section 10(b) "does not reach all commercial transactions that are fraudulent and affect the price of a security in some attenuated way." *Id.* at 162.

Taken together, the Court's Section 10(b) cases confirm that limitations on the scope of liability are entirely in keeping with the "flexible" approach that the Court has applied to this provision.

III. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES THAT SECTION 10(b) BE INTERPRETED TO AVOID THE CONSTITUTIONAL CONCERNS THAT ARISE IF SECTION 10(b) WERE INTERPRETED TO APPLY TO DISINTERESTED PUBLISHERS.

This Court has long recognized "[t]he elementary rule . . . that every reasonable construction must be

resorted to, in order to save a statute from unconstitutionality." *Hooper* v. *California*, 155 U.S. 648, 657 (1895). This Court has explained that because "Congress, like this Court, is bound by and swears an oath to uphold the Constitution[,] . . . . courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.*, 485 U.S. at 575. Moreover, because it would be improper for a court to answer a constitutional question that the statute at issue does not actually raise, "the rule plainly must mean" that courts should, if possible, avoid not only constructions that actually violate the Constitution, but those under which "grave and doubtful constitutional questions arise." *United States ex rel. Attorney Gen.* v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). This, too, reflects this Court's conclusion that "Congress, which has always sworn to protect the Constitution, would err on the side of fundamental constitutional liberties when its legislation implicates those liberties." *Lowe*, 472 U.S. at 206 n.50 (internal quotation marks omitted).

As a result, the lower courts are obligated to avoid statutory constructions that raise serious constitutional questions "if *any* other possible construction remains available." *Catholic Bishop*, 440 U.S. at 500 (emphasis added). In making that determination, a court should look to the "statute's text read in light of its purpose." *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005) (citing *Zadvydas* v. *Davis*, 533 U.S. 678, 697-99 (2001)). Further, courts must not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.*, 485 U.S. at 575. Rather, "there must be present the affirm-

ative intention of the Congress clearly expressed." *Catholic Bishop*, 440 U.S. at 500 (internal quotation marks omitted).

For instance, in *Zadvydas*, this Court held that even though a purpose of a statute that permitted the Attorney General to detain certain aliens was "protecting the community from dangerous aliens," it was not "clear" that Congress intended "to grant the Attorney General the power to hold *indefinitely* in confinement" such aliens. 533 U.S. at 696-97. Likewise, in *Catholic Bishop*, this Court interpreted the jurisdiction of the National Labor Relations Board not to extend to lay teachers at religious schools, thereby avoiding serious First Amendment questions, even "while acknowledging the broad scope of the grant of jurisdiction." 440 U.S. at 499. Indeed, even when Congress intends for ambiguities in a statute to be interpreted by an administrative agency rather than the courts, courts nonetheless will not defer under *Chevron U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), to agency interpretations that raise avoidable constitutional questions. See *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001). In such cases, the Court has adopted the "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.*; see *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

This Court has repeatedly applied these interpretive principles to construe federal statutes and regulations in a manner that would avoid difficult questions under the First Amendment. Thus, in *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516 (2002), the Court held that a "facially . . . broad" statute that prohibited employers from interfering

with employees' exercise of rights under the National Labor Relations Act ("NLRA") did not prohibit employers from filing lawsuits in retaliation for the exercise of those rights, even where the lawsuits ultimately prove unsuccessful, because such a prohibition would raise serious questions under the First Amendment. *Id.* at 536. Likewise, in *Edward J. DeBartolo Corp.*, the Court held that a different provision of the NLRA did not regulate the distribution of handbills by union members seeking to influence a tenant to stop dealing with a nonunion contractor, even though such activity fell within the broad terms of the statute, because such regulation would be constitutionally suspect. 485 U.S. at 575, 588. And, in *Catholic Bishop*, the Court interpreted the NLRA not to apply to schools operated by churches, thereby avoiding "sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." 440 U.S. at 507.

2. In light of the serious constitutional questions that its interpretation of Section 10(b) raises under the First Amendment, the court of appeals should have avoided that interpretation in favor of "*any* other possible construction." *Id.* at 500 (emphasis added). See also *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (a court should resort to "'every reasonable construction'" of a statute before ruling on its constitutionality). Instead, the court of appeals read the statute's "in connection with" element expansively: Under its analysis, the element was satisfied in this case because (i) the purchase of securities was said to be "'necessar[y]'" to the sale of Petitioners' report, since an uptick in stock purchases would generate increased interest in the report, Pet. App. 26a-30a; (ii) Petitioners "intended" for their readers to purchase the security at issue, *id.* at 32a-

33a; and (iii) Petitioners knew that their readers were likely to rely on their investment advice, *id.* at 33a-41a.

The court of appeals' analysis would likely apply equally to any regularly-followed financial commentator who provided advice pertaining to a particular security. As a result, if the basis for any such opinion were, in hindsight, shown to be incorrect, the commentator could be subject to suit under Section 10(b)—without any First Amendment protections—for providing his or her readers commentary regarding a marketable security.

The court of appeals held that the constitutional avoidance doctrine was inapplicable because Section 10(b) could not be read any more narrowly. Pet. App. 41a-47a. But, as explained above, under this Court's cases, Section 10(b) is *best* interpreted as requiring a significant nexus between the alleged fraud and the purpose or sale of a security. See *supra* 9-14. When a disinterested publisher sells non-personalized investment advice, the transaction is complete regardless whether any securities are actually bought or sold. Had the court of appeals interpreted such transactions not to satisfy the statutory nexus requirement, it could have avoided the imposition of Section 10(b) liability—which does not afford defendants protections like an "actual malice" standard, a requirement of proof by clear and convincing evidence, or independent appellate review—to publications that Court recognized in *Lowe* to be protected by the First Amendment.

The court of appeals' reasons for finding its expansive interpretation compelled by the statute are fundamentally at odds with this Court's precedent. First, the court of appeals noted that unlike the provision at issue in *Lowe*, which specifically

excluded certain disinterested publishers, Section 10(b) "applies to *any person*" and therefore should be read to include disinterested publishers. Pet. App. 46a (emphasis in original). But Section 10(b) has not been applied to support liability against "any person." It applies to any person *who satisfies the statute's elements*. Thus, Section 10(b) does not apply, for example, to aiders and abettors, *Cent. Bank*, 511 U.S. at 177-78, or non-fiduciaries with no duty to disclose, *Chiarella*, 445 U.S. at 232. Whether a person is subject to the requirements of Section 10(b) further depends on satisfaction of the "in connection requirement."

Second, the court of appeals held the avoidance doctrine inapplicable to its construction of Section 10(b) because it concluded that, under this Court's precedent, "Congress intended the requirement to be flexible," Pet. App. 46a, and legislated with the purpose of "providing a flexible regime for addressing new, perhaps unforeseen, types of fraud," *id.* at 47a. That holding cannot be reconciled with the constitutional avoidance doctrine, which requires that a statute will not be interpreted in a manner that raises a serious constitutional question unless "the affirmative intention of the Congress [is] clearly expressed." *Catholic Bishop*, 440 U.S. at 500 (internal quotation marks omitted). The presumption that Congress does not intend to enact legislation raising serious constitutional questions thus can override a general statutory objective, *Zadvydas*, 533 U.S. at 696-97, and limit the range of permissible interpretations available to administrative agencies, *Solid Waste Agency*, 531 U.S. at 172-73. Under this precedent, a general congressional intent that the securities laws be interpreted flexibly, without more, provides no basis to conclude that Congress intended

to extend liability under Section 10(b) to disinterested publishers of financial information about the public securities markets.

Moreover, the court of appeals did not mention or attempt to distinguish the multiple limitations that this Court has held to be consistent with Section 10(b)'s "flexible" purpose. It failed to note the countervailing principle that "the statute must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b)." *Zandford*, 535 U.S. at 820. Cf. *Zadvydas*, 533 U.S. at 696-97 (holding that Congress did not authorize the indefinite detention of removable aliens, even though one statutory purpose supported the practice, where another statutory purpose undermined it). The court further failed to acknowledge that a broad interpretation of the "in connection with" requirement is certainly not compelled by the text of Section 10(b). See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006) ("A narrow construction would not, as a matter of first impression, have been unreasonable . . . .").

3. The potential chilling effects of the decision below are significant. The court of appeals found the First Amendment inapplicable to this case because it involved allegations of "actual fraud," Pet. App. 49a, but it failed to recognize that under the First Amendment, the initial determination whether otherwise protected speech constitutes unprotected "actual fraud" must be made while providing such evidentiary protections as the requirement that "actual malice" be proven through clear and convincing evidence. See *N.Y. Times*, 376 U.S. at 279-80; *Telemktg. Assocs.*, 538 U.S. at 620.

Without these protections, any publisher of disinterested investment analysis stands at risk that it could face liability under Section 10(b) if, as happened in this case, one of its sources were later to disclaim having made a statement attributed to that source in the publication. See Pet. App. 12a-13a & n.11, 47a (explaining that the relevant false statement was that Petitioners based their information on statements from a source, a fact that the district court deemed false based on a credibility determination). The risk is particularly great when scienter can be inferred merely from the fact that a disputed statement in a conversation was found—by a preponderance of the evidence—not to have been made. *Id.* at 16a-20a.

If the court of appeals' error is left uncorrected, the extent of this risk will be limited only by the enforcement discretion of the SEC. "But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States* v. *Stevens*, No. 08-769, slip op. at 18 (U.S. Apr. 20, 2010). The court of appeals has granted the SEC unprecedented authority under Section 10(b), and it is cold comfort to publishers to hope that the SEC will operate within narrower constraints than the court's interpretation allows. Just as this Court "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly," *id.* (citing *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001)), neither should it allow to stand an unconstitutionally broad interpretation of Section 10(b) that raises serious issues under the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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LIST OF *AMICI CURIAE*

InvestorPlace Media LLC is a privately held company that publishes investment advice from over fifteen different experts through free and subscription newsletters, e-letters, and reports. These publications sometimes contain recommendations that readers purchase or sell securities offered by companies in which neither InvestorPlace Media nor the author has any fiduciary duty or financial interest.

ALM Media, LLC ("ALM") is a leading provider of specialized business news and information, focused primarily on the legal and commercial real estate sectors. ALM publishes *The American Lawyer*, *Corporate Counsel*, Law.com, *The National Law Journal* and *Real Estate Forum*, among other publications, websites and conferences.

CNBC, Inc. provides real-time financial market television coverage and business information to more than 370 million homes worldwide, including more than 95 million households in the United States and Canada. CNBC's 16 live hours a day of business programming in North America includes reports from CNBC News bureaus worldwide. CNBC.com and CNBC Mobile Web offer real-time stock quotes and charts, CNBC's breaking news & analysis, and market and pre-market data.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, and local news and information Web sites. The company's portfolio of locally focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent);

daily and community newspapers in 13 markets; the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service; and United Media, a syndicator of more than 150 comic strips and editorial features.

Eagle Publishing, Inc. is the parent company of: (i) Eagle Financial Publications, LLC, publisher of several leading investment newsletters; (ii) Regnery Publishing, Inc., a 62-year-old trade-book publishing company; (iii) Human Events, LLC, publisher of the 66-year-old political newsweekly, Human Events; (iv) several current affairs/political e-newsletters; and (v) the Conservative Book Club, established in 1964.

The Financial Publishers Association is committed to empowering investors to make informed decisions with unbiased, disinterested information that is free from conflicts of interest. Members of the Financial Publishers Association include: Boardroom.com, Inc.; Business Financial Publishing, LLC; Casey Research, LLC; The Complete Investor; The Motley Fool; NewsMax Media, Inc.; Weiss Research, Inc.; and Zacks Investment Research, Inc. They provide thoughtful, intelligent, unbiased information to guide their readers to protect and grow their wealth so that their readers can make sound investment decisions.

Forbes LLC is the publisher of Forbes and other leading magazines, including Forbes Life and Forbes Asia, as well as an array of investment newsletters and the leading business website, Forbes.com. Forbes has been covering American and global business since 1917.

Gannett Company, Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including *USA*

Today, and several hundred non-daily publications, including *USA Weekend*, a newspaper magazine. The company also owns 23 television stations and more than 100 web sites that are integrated with its publishing and broadcasting operations.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines, and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces programming for television, and is the majority owner of Hearst-Argyle Television, Inc., a publicly traded company that owns and operates numerous television broadcast stations.

Landmark Media Enterprises, LLC (formerly Landmark Communications) is a privately held media company headquartered in Norfolk, Virginia with interests in print and internet publishing, internet marketing/web services, and broadcast television.

Lee Enterprises, Inc. is a leading provider of local news, information and advertising in primarily midsize markets, with 49 daily newspapers and a joint interest in four others, rapidly growing online sites and 300 specialty publications in 23 states. Lee's newspapers have circulation of 1.4 million daily and 1.7 million Sunday, reaching more than four million readers daily. Lee's online sites attract nearly 16 million unique visits monthly, and Lee's weekly publications have distribution of more than 4.5 million households. Lee's newspaper markets include Madison, Wisconsin; Lincoln, Nebraska; Davenport, Iowa; St. Louis, Missouri; Billings, Montana; Bloomington, Illinois; Tucson, Arizona; and Napa, California.

The McClatchy Company publishes 31 daily newspapers and 47 non-daily newspapers throughout the country, including *The Sacramento Bee*, *The Fresno Bee*, *The Miami Herald*, *The Kansas City Star*, *The Modesto Bee*, *The Merced Sun Star*, and *The San Luis Obispo Tribune*. The newspapers have a combined average circulation of approximately 2,500,000 daily and 3,100,000 on Sunday.

Media General, Inc. is an independent, publicly owned communications company with interests in newspapers, television stations and interactive media. It is a leading provider of news, information and entertainment across multiple media platforms, serving consumers and advertisers in strong local markets, primarily in the Southeastern United States. The company's operations include 18 network-affiliated television stations and associated Web sites, 21 daily newspapers and associated Web sites, more than 200 specialty publications that include weekly newspapers, and niche publications targeted to various demographic, geographic and topical communities of interest.

The New York Times Company publishes *The New York Times*, *The Boston Globe*, *The International Herald Tribune* and 15 other daily newspapers throughout the United States. It also owns and operates more than 50 websites, including NYTimes.com, Boston.com, and About.com. The New York Times' circulation is close to 1 million daily and about 1.4 million on Sunday. The New York Times Company is a publicly traded corporation.

The Newspaper Association of America ("NAA") is a nonprofit organization representing more than 2,000 daily and non-daily newspapers in the United States and Canada. A major issue affecting NAA members is the ability to gather and

report on matters of public concern, such as financial or business news and information, without unreasonable restraints.

WP Company LLC publishes *The Washington Post*, a leading newspaper with daily and Sunday circulation primarily in the Washington, D.C. metropolitan area.

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IN THE
Supreme Court of the United States

PIRATE INVESTOR LLC AND FRANK PORTER STANSBERRY,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici curiae represent individual and institutional members of the press.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

With some 600 members, ASNE is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's

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[1] Pursuant to Sup. Ct. R. 37, counsel for the *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; and that written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk.

members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and maintains bureaus in 240 cities worldwide. AP news reports in print and electronic formats of every kind reach a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 121 countries.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The Radio Television Digital News Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan or-

ganization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center pursues that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

Amici view the Fourth Circuit's decision in this case as a significant threat to the free dissemination of news about the financial markets and specific investment opportunities. *Amici* fear that, if this Court does not reverse the decision below, some financial news organizations will be permitted to publish freely and others will not. This would be contrary to the spirit of our system of a free and independent press. The Fourth Circuit ruling approves censorship in the form of finding a statement fraudulent without the appropriate level of First Amendment deference or independent appellate review. The opinion below essentially grants the courts the power, denied to them by the Constitution, to potentially discriminate between publications.

Amici believe, on the contrary, that the First Amendment permits any person freely to publish information about any aspect of the social, economic, or political life of our country, including financial trends, stock market predictions, and securities recommendations. Furthermore, the First Amendment precludes subsequent punishment of untruthful information without the application of a heightened evidentiary standard. Accordingly, *amici* submit this brief in support of Petitioners.

SUMMARY OF ARGUMENT

This Court should grant Petitioners' request for certiorari to articulate the proper First Amendment standard when dealing with claims of fraud under § 10(b) of the Securities exchange act of 1934. The application of § 10(b) to non-fiduciary publishers who do not trade or own shares uniquely impinges upon the constitutional rights of journalists and the public. It has the potential of permitting viewpoint discrimination[2] and unequal application to different publishers, and may in the future be used by subjects who disapprove of certain editorial content to circumvent "actual malice" protections required in libel and other actions.

This Court should clarify that if § 10(b) is properly applied to non-fiduciary publishers who do not trade or own shares; deference to the First Amendment should be strictly maintained. The Fourth Circuit erred in denying independent appellate review of the findings of fact as is required in First Amendment cases as a safeguard against forbidden intrusions into free expression.

As all speech is presumed to be protected by the First Amendment, these standards should be strictly

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[2] In fact, counsel for the Securities and Exchange Commission in the U.S. District Court trial said that while the Commission would not hesitate to apply § 10(b) to *The Wall Street Journal*, it may not pursue action against a general publication like *The Baltimore Sun*, because "[y]ou buy the *Sun* with no particular -- you don't buy it to read the investment column ... [t]hat is not why it is published." Joint Appendix at 1447.

enforced so that courts may not give short shrift to the Constitution by simply labeling speech as fraud without an appropriate First Amendment analysis.

Taken out of the context of generalized financial advice, the standards applied by the Fourth Circuit have the potential to go well beyond Petitioners to affect all reporting on financial issues, particularly regarding stocks. SEC counsel at trial gave inconsistent statements about whether the Commission would act identically as it did in this case regardless of the source of the speech — a disquieting thought. Counsel did state, however, that the SEC would not hesitate to pursue action against even widely-circulated, mainstream financial publications.[3]

The Fourth Circuit opinion, which allows the First Amendment of the Constitution to be trumped by an overbroad reading of § 10(b), conflicts with opinions that have held that to comply with the First Amendment, any regulation on speech must be narrowly drawn. The opinion directly affects the media and journalists who disseminate information to the public. The court's refusal to independently review, with proper First Amendment deference, the designation of the speech at issue as fraud threatens to chill all speech that could potentially relate to securities.

The court has created the prospect of open-ended government intrusion into an area of speech that has deep historical roots, provides a great deal of public service, and is especially important into to-

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[3] Pet. Cert. at 10.

day's economic climate. More generally, in reaching its decision the Fourth Circuit has applied reasoning that does not comply with well-established First Amendment case law. This will inevitably lead to confusion among the federal circuits.

The issue of whether § 10(b) is applicable to a non-fiduciary speaker who does not own or trade shares, and what First Amendment safeguards are necessary before this occurs, must be resolved by this Court.

ARGUMENT

I. The decision below applying § 10(b) to a publisher of general financial recommendations with no First Amendment safeguards will impermissibly chill valuable speech regarding financial issues.

Although this case does not involve mainstream financial reporting, Petitioners are nevertheless disinterested publishers of financial information with no direct connection or fiduciary duty to the seller or buyer of securities. Thus, the underlying rationale could be equally applicable to any independent publisher of financial information in the future, casting a chill over reporting on financial matters. If a publisher makes a statement that later proves to be false, or gives general advice that in retrospect was inaccurate, it can be held liable under § 10(b). This is especially problematic because of the inherent volatility of financial markets. Even former Federal Reserve Chairman Alan Greenspan was this year aggressively questioned on Capitol Hill regarding his perceived failure to foresee and prevent the nation's economic problems.[4]

When independent publishers are involved, the First Amendment requires more breathing room. Restrictions on their speech must be drawn as narrowly as possible so that those who wish to publish will not

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[4] John D. McKinnon and Randall Smith, *Greenspan on Capitol Hot Seat*, THE WALL STREET JOURNAL, April 8, 2010 at A4 ("For Mr. Greenspan, once regarded as an oracle on Capitol Hill, it was a further indication of how the financial crisis has upended reputations.").

be unconstitutionally deterred from speaking. As this Court wrote this term, "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, No. 08-769, 130 S.Ct. ____ (April 20, 2010).

A. Financial reporting has long been a cornerstone of journalism, informing the public and interpreting economic information on its behalf.

Financial reporting is a staple of U.S. news media, valuable for exposing careless financial activity, documenting the state of the nation's economy, prompting reform, and encouraging fiscal responsibility.

Especially in times of economic tumult, the public has turned to financial reporting in publications for information and commentary. During the Great Depression and even prior,[5] *The New York Times* and other publications reported on the status of Wall Street and made predictions about the future of trading and the economy.[6]

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[5] *See, e.g., Two Important Receiverships Cause Depression*, N.Y. TIMES, January 2, 1894, at 10 ("The stock had sold at 14 on Saturd[a]y, and on Tuesday following the confession of bankruptcy it moved between 13 and 14.").

[6] *See, e.g., Wall St. Cheered By Bankers' Views*, N.Y. TIMES, January 18, 1931, at 41 ("All are cautious on date but two see depression now at bottom, and the three assert securities are underpriced.").

Echoing the historical media reaction to financial crises, in recent years the press has kept the public informed about the country's finances. Notably, there has been a great deal of useful reporting about the contributing factors to the country's recent economic recession.

All of this is possible because reporters and authors of books and periodicals, since the beginning of American journalism, have regularly reported on the activities of financial power players and companies. Unfortunately, this form of valuable transparency could end if courts allow application of § 10(b) to a statement related to sales of securities, from an independent publisher, which is later proved to be incorrect.

The decision below permitted an overly broad reading of the requirements for fraud under § 10(b) of the Securities Exchange Act. Indeed, the Fourth Circuit's reasoning is so broad that it would seem that any media entity that disseminates information about the sale of securities could be punished whenever a court made an *ex post facto* determination that a disinterested publication made a false statement, and that statement led another person to make a securities purchase.

Especially after the economic tumult of the last few years, it is imprudent to open the door to applying § 10(b) to disinterested financial publishers; as such reporting has always played a valuable role in exposing corruption. In fact, it is crucial to encourage more aggressive financial reporting as another measure to hold Wall Street accountable for its actions.

The journalistic landscape of the last decade has been dotted with much valuable financial reporting. For example, in 2007 *Institutional Investor* magazine published a George Polk Award[7]-winning article that predicted impending large-scale economic calamity. Edward Chancellor's article, *Ponzi Nation*, discussed in detail the toll that excessive risk-taking, interconnected investments, subprime mortgages, and underregulation of hedge funds would surely take on the world economy.[8] The Polk committee noted that Chancellor "sounded the alarm months before the financial markets began their roller coaster ride south."[9] The story provided a unique perspective of the behind-the-scenes activities of Wall Street — activities with effects that would eventually cascade to the world economy as a whole.

But this example is far from unique. With regard to the sale of securities, in 2007 *The Wall Street Journal*'s Charles Forelle, James Bandler and Mark Maremont wrote an award-winning (Pulitzer and

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[7] The George Polk Awards are conferred annually to honor special achievement in journalism. Some of the most respected names in journalism have won George Polk Awards, including Edward R. Murrow, Christiane Amanpour, Carl Bernstein, David Halberstam, Gay Talese, Fred Friendly, I. F. Stone, Morley Safer, Joseph Lelyveld, Anthony Lukas and Walter Cronkite. They were established by Long Island University in 1949 to commemorate Polk, a CBS correspondent murdered the year before while covering the Greek civil war.

[8] Edward Chancellor, *Ponzi Nation*, INSTITUTIONAL INVESTOR, Feb. 7, 2007.

[9] Press Release, Long Island Univ., Long Island University Announces Winners of 2007 George Polk Awards (Feb. 19, 2008), *available at* http://www.brooklyn.liu.edu/polk/press/2007.html.

George Polk prizes) series that sparked federal investigations into shareholder deception.[10] Executives at top corporations engaged in inappropriate self-dealing by buying low and selling high, thanks to a widespread practice of backdating stock option awards. The regulatory investigations covered potential shareholder deception at more than 130 companies — some that were suspected of using backdating to exploit low stock prices after the 9/11 terrorist attacks. *The Wall Street Journal* also won awards in 2001 for a series of stories on misleading and fraudulent practices by Credit Suisse First Boston in promoting initial public offerings.[11] That series resulted in a $100 million federal fine for the company — one of the largest ever.

In the electronic medium, Bloomberg News produced top-notch reporting on the global financial meltdown; indeed, the U.S. House and Senate utilized Bloomberg's articles to prepare for hearings in which legislators questioned top finance executives about the collapse.[12]

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[10] Katharine Q. Seelye and James Barron, *Wall Street Journal Wins 2 Pulitzer Prizes*, N.Y. TIMES, April 17, 2007 at B8.

[11] Press Release, Long Island Univ., Long Island University Announces Winners of 2001 George Polk Awards (Feb. 20, 2002), *available at* http://www.brooklyn.liu.edu/polk/press/awards.pdf.

[12] Press Release, The New York State Society of CPAs, Journalists Receive Awards from NYSSCPA for Financial Reporting (March 31, 2009), *available at* http://www.nysscpa.org/society/PR/3-31-09releasea.htm.

The calculus changes with the Securities and Exchange Commission's counsel making the chilling pronouncement at trial that the Commission would not hesitate to apply § 10(b) to any financial publication, specifically mentioning *The Wall Street Journal*.[13]

Furthermore, under the Fourth Circuit's reasoning, the fact that publications aim to improve their reputations by disseminating accurate financial information bolsters a claim of fraud under § 10(b).[14] Such reasoning creates a disincentive to freely publish accurate information — an untenable result, as far as the First Amendment is concerned.

The production of informative and timely financial articles is in the public's best interest. Courts should not allow for improper government interference with journalists' pursuit of financial reporting. With such a judicial interpretation of § 10(b) in place, future reporting may be chilled.[15]

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[13] Pet. Cert. at 10.

[14] *SEC v. Pirate Investor*, 580 F. 3d 233, 247 (4th Cir. 2009) (finding that "reputational gain" that encourages the future purchase of more information is a "connection" to the sale of securities).

[15] *See Daniel v. Dow Jones & Co.*, 520 N.Y.S.2d 334 (N.Y. Civ. Ct. 1987) (granting motion to dismiss suit against news service report that allegedly contained false and misleading information that led the plaintiff to make a bad investment; noting the potential chilling effect finding otherwise would have on papers).

II. Regardless of connection to current affairs, the First Amendment fully protects financial and economic advice.

Setting aside the need to protect financial publications generally, the fact that a publication gives specific advice about securities does not unilaterally exclude it from First Amendment protection. The First Amendment's guarantees "embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Thus, the First Amendment does not cease to protect speech that may not be specifically germane to current events or politics. The First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id.* at 101-02.

To the extent that financial reports discuss economic, financial or investment matters generally, there can be no doubt that they are fully protected by the First Amendment. This Court's "cases have never suggested that expression about . . . economic . . . matters . . . is not entitled to full First Amendment protection." *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977).

With regard to financial analyses and reports that value or recommend specific securities, this Court has never held that specificity strips publications of full First Amendment protection. Speech is not deprived of the full protection of the First Amendment merely because it is practical and narrowly useful, rather than being of broad, abstract import.

Moreover, there is no distinction of constitutional significance between "general" and "specific" investment recommendations — that is, for example, between a prediction of the future course of the stock market as opposed to a recommendation to buy stock in one company rather than another. Nor does the fact that readers may act on the basis of specific advice diminish its constitutional protection. *See Thomas v. Collins,* 323 U.S. 516, 536-37 (1945) ("When legislation or its application can confine [speakers] . . . to innocuous and abstract discussion . . . and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end."); *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415, 429 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper.").

Instructively, a Maryland federal court noted in a case involving the very same corporation that produces Petitioner's publications that because the particular publication in that case was offered to the general public and advice given was not specifically tailored to the financial situation of any individual subscriber, it was "subject to the same protection under the First Amendment as any other publication." *Ginsburg v. Agora, Inc.*, 915 F. Supp. 733, 740 (D. Md. 1995) (citing *Lowe v. SEC*, 472 U.S. 181, 210 (1985)); *see also Lubin v. Agora*, 882 A.2d 333 (Md. 2005) (finding that a subpoena of the same company had First Amendment implications).

Nor does the use of hyperbole diminish speech's full First Amendment protection. Financial journalism is often rough and boisterous, and tends to reflect opinion rather than pure fact.

As media expert David L. Nelson noted in a report to the lower court in this case, "almost all media" try to "brag" and "shout" to connect with the audiences, and "[n]ewsletters are no exception." Joint Appendix at 4352. Nelson noted that financial newsletters "use aggressive, usually upbeat or 'Doomsday' rhetoric to attract attention and get subscribers." *Id.* at 4354. In Nelson's trial testimony, he also testified about the exuberant tone that readers have come to expect of newsletter writers. *Id.* at 1171. This is exceedingly common throughout the particular genre. Financial discourse is often prone to heated exchanges and speculation, which most readers take in the aggregate and filter for themselves.

However, financial reports' investment recommendations concerning specific securities and their use of bombastic tone do not detract from their entitlement to full First Amendment protection.[16]

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[16] Furthermore, the high price and low circulation of information has no bearing on constitutional protection. *Reynolds v. Murphy*, 188 S.W.3d 252, 265 n.17 (Tex. App. 2006) ("News services, whether free to the public, as are television or radio, or more expensive specialized media, such as defendant's computerized database, are instruments for the free flow of all forms of information, and should be treated as unquestionably within the First Amendment's guarantee of freedom of the press.") (citing *Daniel, supra* note 13, at 101-102 ("[T]he cost of the service and the degree of its distribution are not related to the importance of the protection needed for the statement at issue.")).

III. The Fourth Circuit should have conducted an independent appellate review because of the instant case's First Amendment implications.

A. Restrictions on speech are presumptively invalid and any such restriction must be narrowly construed.

This Court has said that the requirement that all viewpoints be treated equally, one of the foundations of the First Amendment, imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U. S. 485 (1984).

Although not all speech is of equal First Amendment protection, no cause of action or prosecution can claim "talismanic immunity from constitutional limitations" and all "must be measured by standards that satisfy the First Amendment." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). Such constitutional protection does not depend upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 (1963). After all, "[e]rroneous statement is inevitable in free debate . . . and it must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive," *Sullivan* at 272 (citation omitted).

Indeed, the principle that speech needs wide latitude to flow freely was fiercely supported by the core founders of the United States of America. Thomas Jefferson, no stranger to aggressive scrutiny by the press, once wrote, "[W]ere it left to me to decide

whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter." Letter from Thomas Jefferson to Edward Carrington, Delegate to the Continental Congress (Jan. 16, 1787). These beliefs were reflected in the First Amendment to the U.S. Constitution.

Because of the constitutional requirement that First Amendment freedoms be given sufficient breathing space, the government may regulate in the area only with narrow specificity. *See Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940). Any government regulation of speech "susceptible of regular application to protected expression" is impermissible, *Houston v. Hill*, 482 U.S. 451, 467 (1987), and analysis must be done carefully, for "[w]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding — inherent in all litigation — will create the danger that the legitimate utterance will be penalized." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

This Court has in the past rejected the need for close judicial oversight with regard to speech involving economic matters stating, "The dangers of fraud, deception, or overreaching . . . are present in personalized communications but are not replicated in publications that are advertised and sold in an open market." *Lowe*, 472 U.S. at 210.

B. The First Amendment requires a heightened evidentiary showing that a communication, always presumed to be protected, should be stripped of that protection.

All speech at its inception is protected, and when a case requires a court to strip a communication of its First Amendment protection, the evidence in the record must be clear and convincing.[17] *Bose Corp.*, 466 U. S. 485. Appropriate heightened proof requirements have been held to provide sufficient breathing room for protected speech. *See Sullivan*, 376 U. S. at 279-280; *see also Bose*, 466 U. S. at 502. This Court held that with regard to imposing liability on a publisher, a simple negligence standard would constitute an "intolerable burden." *Time, Inc. v Hill*, 385 U.S. 374, 387-89 (1967).

As an additional safeguard responsive to First Amendment concerns, an appellate court may independently review lower courts' findings. *Cf. Bose Corp.*, 466 U. S., at 498-511 (*de novo* appellate review of findings regarding actual malice).

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[17] The proper standard on these facts is that of "actual malice," as the First Amendment requires a heightened standard. *See Daniel*, 520 N.Y.S.2d at 339 ("The societal right to free and unhampered dissemination of information precludes liability absent proof of knowing falsity or reckless disregard for the truth."); *see also Nat'l Life Ins. Co. v. Phillips Publishing*, 793 F. Supp. 627 (D. Md. 1992) (holding in a defamation suit that "Profitable Investing," a financial newsletter, was entitled to the "actual malice" standard because of First Amendment concerns).

C. This Court should clarify the importance of First Amendment deference and elucidate that restrictions on speech should be narrowly construed.

The use of independent appellate review as an important constitutional safeguard should be reaffirmed by this Court. The Fourth Circuit erred in rejecting Petitioners' argument that the SEC was required to prove the elements of § 10(b) by clear and convincing evidence, before the communication was stripped of its protected status. The Fourth Circuit used the evidentiary standard generally applicable to civil enforcement actions, which requires proof by a "preponderance of the evidence." *SEC v. Pirate Investor*, 580 at 242.

However, this approach cannot be squared with the First Amendment. *Bose* requires any case that implicates the First Amendment to comport with the "clear and convincing" evidentiary standard before the speech is stripped of protection. Because § 10(b) has not been applied to independent publishers of general financial advice,[18] the applicable standards in place do not conform to accepted First Amendment standards. This is likely because in the course of creating the regulation, it was not contemplated that it had the potential to implicate financial speech of non-fiduciaries who neither own nor trade securities. With regard to such speakers, a proper First Amendment analysis would first assume the pro-

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[18] *See Sup't of Ins. V. Bankers Life & Cas. Co.*, 404 U.S. 6, 8 (1971).

tected status of the speech, and then scale back that protection if necessary.

IV. The application of § 10(b) to publishers violates the First Amendment because it will have substantial effects on newsgathering.

Furthermore, to counter a defense of First Amendment protection, the SEC may not use the standard set forth in *Cohen v. Cowles Media*, as it pertains only to laws that have "incidental" effects on the press's ability to gather and report the news. 501 U.S. 663 (1991). Unlike in *Cohen*, § 10(b)'s impact on newsgathering and news reporting would be more than merely incidental, and thus its application would violate the First Amendment.

In *Cohen*, the plaintiff was a political staffer that leaked information about an opponent to local newspapers on the promise of anonymity. 501 U.S. 663, 665 (1991). On the theory of promissory estoppel, the state courts held the newspapers liable for breach of contract for printing the anonymous name. *Id.* at 666. Prior to that ruling, the defendants argued that the First Amendment prevented the litigation because allowing the judicial enforcement of confidentiality contracts would chill the free speech of newspapers that had legally obtained truthful information, under the existing standards set forth in this Court's prior cases. *Id.* at 668.

Instead, this Court in *Cohen* set forth the new standard that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669.

The Court based its decision on precedent upholding the rule that journalists may not break the law while newsgathering by trespassing, intimidating, or breaking and entering. *Id.* Liability under contract doctrine was generally applicable and thus the First Amendment did not preclude its enforcement.

In contrast with this scenario, the application of § 10(b) of the Securities Exchange Act of 1934 requires additional First Amendment safeguards. Although there was no express exception for publishers in the language of the law, § 10(b) was intended to apply only to true insiders — those with the highest level of power and internal knowledge that influences the sale of securities. *See Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1353 (S.D.N.Y. 1977) ("The securities laws, and particularly Rule 10b-5, were not developed with the intention of overlapping or reinforcing the law of libel, nor to inhibit the exercise of freedom of the press."); *Cf. Lowe v. SEC*, 472 U.S. 181, 204 (1985) ("Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of non-personalized publishing activities.").

A regulation that controls the action of one who improperly discloses information to sell securities does not in effect apply to all citizens equally, as a contract or trespass law statute does. This is true because an additional layer of constitutional scrutiny is required if a restriction on speech has a substantial effect on First Amendment freedoms. *See Food Lion Inc. v. Capital Cities/ABC*, 194 F.3d 505, 522 (4th Cir. 1999).

As was discussed more fully in section I *supra*, the expansion of § 10(b) has the potential to dramati-

cally chill speech in a field where financial journalists must be free to act as watchdogs without fear of government intervention. Furthermore, the instant case is distinguishable from a traditional *Cohen* case in that the speech itself is the conduct being punished. The First Amendment effects on speech would not be incidental, as the *Cohen* standard sets forth, but direct and overreaching. Government pressure to refrain from making any statements about securities, in case they later prove to be false, is a substantial negative effect on the gathering and dissemination of news.

Although financially-specialized journalists ostensibly have knowledge about securities that is greater than that of the average reader, they do not possess the types of duties that would fairly give rise to the culpability contemplated by § 10(b). Without an additional layer of constitutional scrutiny, its application to non-fiduciary publishers who neither trade nor own stock violates the First Amendment.

CONCLUSION

No form of speech is from its inception automatically placed outside the First Amendment's protections. If permitted to stand, the Fourth Circuit ruling threatens financial reporting in publications throughout the country. The Court must clarify that any removal of speech from the First Amendment's protections must be proved by an absolute minimum of "clear and convincing" evidence of actual malice on appeal. Because of the Fourth Circuit's lack of deference to the First Amendment, which will result in an unconstitutional chilling effect on all publications, *amici* therefore respectfully request that this Court grant Petitioners' petition for certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States

PIRATE INVESTOR LLC AND FRANK PORTER STANSBERRY,
Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF SOCIETY OF PROFESSIONAL JOURNALISTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR THE SOCIETY OF PROFESSIONAL JOURNALISTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Amicus curiae respectfully submits this brief in support of the petition for a writ of certiorari.[1]

INTERESTS OF *AMICUS CURIAE*

Amicus curiae Society of Professional Journalists ("SPJ") is a professional organization that includes broadcast, print, and online journalists. SPJ has more than 8,000 members and 250 local chapters. Among its members are numerous reporters dedicated to providing the public with financial news and commentary. For example, SPJ's secretary treasurer is a reporter for the *South Florida Business Journal* and its volunteer Foundation president is an editor for *Bloomberg News*. SPJ's members have no financial interest in the companies they cover—that is, they do not own or in any way facilitate the trading of securities in the companies on which they report or comment, nor do they owe any relevant fiduciary duty to investors.

In the decision below, a routine dispute between a source and a writer about what was said in a conversation supported a securities fraud verdict resulting in significant civil and injunctive penalties. As a

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties received timely notice of *amicus*'s intent to file this brief. All parties have consented to its filing, and letters reflecting their consent have been filed with the Clerk.

result, the decision has called into doubt important First Amendment protections for disinterested financial news reporting and commentary, leaving journalists exposed to burdensome securities fraud litigation and the risk of harsh punishment. Left undisturbed, the decision below will inevitably and understandably cause a reduction in the amount of financial news and commentary available to the public.

REASONS FOR GRANTING THE PETITION

In this case, the Fourth Circuit sanctioned the use of securities fraud laws to circumvent First Amendment protections previously relied on by the financial news industry. The court of appeals' decision to render the First Amendment altogether irrelevant misconstrues this Court's precedents and is in sharp tension with numerous courts of appeals decisions. The decision below will inhibit the financial news and commentary that is so valued by consumers and professionals and so necessary to efficient operation of the markets. Review is warranted.

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE WHETHER ANY FIRST AMENDMENT PROTECTIONS APPLY TO FRAUD ACTIONS BASED ON DISINTERESTED FINANCIAL NEWS AND COMMENTARY

The First Amendment prohibits certain restrictions on speech to assure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).[2] As James Madison stated, it

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[2] The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. Const. amend. I.

is "to the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression." Madison's Report on the Virginia Resolutions (1800), *reprinted in* 4 *Elliot's Debates* 571 (1836). Accordingly, all "formulae for the repression of expression"—such as laws against "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business"—"must be measured by standards that satisfy the First Amendment." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (footnotes omitted).

In this case, the Fourth Circuit has allowed the securities fraud laws to be used as a formula for the repression of expression: the publication of disinterested financial news and commentary has resulted in severe civil penalties and the prohibition of future speech based solely on a disagreement between a writer and his source. Petitioners wrote, promoted, and published a financial analysis that stated a representative of a public company had told the author to "watch the stock on May 22nd." Pet. App. 9a.[3] Petitioners did not own stock in the company and did not buy or sell stock for readers. The district court below concluded that the company representative in fact made no such statement regarding May 22 (Pet. App. 12a) and "inferred" that the petitioner "must have known" that his reporting was false. Pet. App. 19a. Based solely on this "false" fact (*see* Pet. App. 20a), the district court applied the securities laws to

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[3] The fraud action is based on two documents: the USEC Special Report, and the Super Insider Tip E-mail used to promote the Special Report. Pet. App. 7a.

impose significant financial and injunctive penalties on the publisher and author. *See* Pet. App. 4a. The court of appeals affirmed, holding that once the speech at issue was subjected to a suit for fraud, the Constitution became irrelevant. As it stated: "Punishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment." Pet. App. 49a.

The Fourth Circuit's reasoning is contrary to decisions of this Court and of the courts of appeals.

A. The Court of Appeals' Holding That The First Amendment Does Not Apply To Fraud Actions Based On Disinterested Financial News And Commentary Is Contrary To *New York Times* And *Bose*.

1. Because First Amendment freedoms are "delicate and vulnerable, as well as supremely precious in our society," this Court has explained that they need "breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). That requires protecting statements that are erroneous because "erroneous statement[s are] inevitable in free debate, and [they] must be protected if the freedoms of expression are to have the 'breathing space' that 'they need to ... survive.'" *N.Y. Times*, 376 U.S. at 271-72 (quoting *Button*, 371 U.S. at 433). Thus, for example, in order to encourage discussions on matters of public concern, the law protects mistaken statements, acknowledging that "the advantages derived are so great that they more than counterbalance the inconvenience of private persons" who are injured by the erroneous speech in some way. *Id.* at 281.

In *New York Times*, the Court held that in light of the importance of open, even if erroneous, speech,

a statement about a public official could not give rise to a libel suit simply because it was offensive and false. 376 U.S. at 279-80. Rather, the speaker must have acted with actual malice—*i.e.*, intent or a reckless indifference to the truth. And the evidence that the speaker acted with actual malice may not be simply a preponderance, but must be clear and convincing—the highest possible in a civil suit.[4]

In addition, even if a district court finds these constitutional criteria are met, an appellate court must perform independent de novo review of the full record to determine whether a plaintiff bringing suit based on a statement has "demonstrate[d] with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *See Bose*, 466 U.S. at 511 n.30 (citing *N.Y. Times*, 376 U.S. at 280).

In *Bose*, this Court explained that "[t]he requirement of independent appellate review ... is a rule of federal constitutional law." 466 U.S. at 510. In that case, which concerned a defamation claim involving a corporation's product, the Court held that whether the evidence "is of the convincing clarity required to strip the utterance of First Amendment protection is

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[4] Cases subsequent to *New York Times* that the reasoning of that case applies to various other causes of action, not just libel. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), for example, the Court required a showing of actual malice on a state-law tort claim of intentional inflection of emotional dismiss for an offensive and allegedly false satiric cartoon. *Id.* at 56. This Court has also applied those standards to false light, *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967), and product disparagement, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 513 (1984).

not merely a question for the trier of fact." *Id.* at 511. Rather, the appellate court, "and particularly Members of this Court," *id.* at 510, "must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Id.* at 511.

The reasoning of *Bose* is not limited to suits labeled "libel," but applies to other cases in which a factual determination or application of law to fact will place communication inside or outside of a protected category. The *Bose* rule, the Court explained, "emerged from the exigency of deciding concrete cases." 466 U.S. at 510. Repeatedly, and in a variety of contexts, the Court has applied independent appellate review "in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech." *Id.* at 503. In such cases, "the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits." *Id.* at 505.[5]

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[5] Other decisions of this Court have applied the heightened constitutional requirements of *Bose* beyond the libel or defamation context. The Court's opinion in *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990), is representative. That case concerned whether certain statements that qualified as commercial speech were misleading, and so outside the protection of the First Amendment. The Court confirmed that when the issue in a case is "[w]hether the inherent character of a statement places it beyond the protection of the First Amendment," then appellate courts "should exercise de novo review." *Id.* at 108.

These constitutional requirements of actual malice, established with clear and convincing evidence, and de novo appellate review ensure that speech has the breathing space demanded by the First Amendment. Even though these constitutional requirements may protect false speech, and thereby curtail the availability of libel claims to protect reputations, the First Amendment interests prevail.

2. The same rationales that led the Court to adopt the actual malice, clear and convincing evidence, and independent review protections in libel actions squarely apply to fraud actions based on disinterested financial speech. Varied opinions about a company's future prospects may serve to sharpen understanding of the company even if one of those opinions turns out, in time, to have been mistaken. Likewise, when publishers report competing or even inconsistent versions of an event, readers evaluate the reports and can come to a judgment about which report, combination of reports, or even a third report, is most likely to be accurate. So too, when a writer and source express different views about the contents of a conversation, the public is well able to assess which view is to be believed. Thus, a robust market in objective public speech about public companies necessarily includes speech that may turn out to be mistaken.

To be sure, when a party facilitates securities transactions of a public company or has a fiduciary relationship to an investor or public company, the risk of the party making false statements to inflate a company's prospects is particularly high. For that reason, the First Amendment does not constrain

every type of fraud suit.[6] But when the speaker has no financial interest in the securities transaction—and instead is a reporter or commentator discussing a public company, the interests weigh heavily in favor of protecting the speech.

Advancing First Amendment protections to those accused of securities fraud but who do not have an interest in the relevant securities is analogous to advancing First Amendment protections to those accused of libeling a public official. Libel suits have an important value: "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Similarly, fraud suits based on financial news and commentary promote a legitimate state interest in protecting the accuracy of information in the marketplace. Because of the societal benefits of libel suits, this Court has long included "libel" among "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (noting that these categories "include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"). So too, because of the societal benefits of fraud suits, this Court has long included "fraud" along with libel in the limited categories of punishable speech. *See United States v. Stevens*, No. 08-769, slip op. at 5 (Apr. 20, 2010). Nonetheless, under the First

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[6] *See, e.g., Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 637 (1980) (collecting cases); *Commodity Trend Serv., Inc. v. CFTC*, 233 F.3d 981, 992 (7th Cir. 2000).

Amendment libel suits must meet certain constitutional thresholds. Even when speech satisfies the elements of a libel action, the Court will not "give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law." *N.Y. Times*, 376 U.S. at 280 (quoting *Button*, 371 U.S. at 429). So too, the Court should not "give any more weight to the epithet" "fraud" than the "libel" label. *See id.* (quotation omitted).

3. The court of appeals' decision illustrates the importance of assuring that the First Amendment protects disinterested financial speech.

The Fourth Circuit relied heavily on this Court's statement in *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600, 612 (2003), that "the First Amendment does not shield fraud" and so declared the First Amendment inapplicable. *Id.* But the Fourth Circuit ignored the crucial point of *Telemarketing*: that "[s]imply labeling an action one for 'fraud,' of course, will not carry the day." *Id.* at 617. In *Telemarketing*, the Illinois fraud law already satisfied *New York Times* because it required a finding, by "clear and convincing evidence," of a scienter standard "resembling actual malice." *Id.* at 620, 621 n.10. Thus, the Court did not need to address whether the First Amendment independently required those protections. *Id.* at 620-21 The Court still observed that independent review of the trial court's findings by an appellate court in the fraud context would serve "[a]s an additional safeguard responsive to First Amendment concerns." *Id.* at 621. The Court's praise of the application of *Bose* review demonstrates that constitutional requirements are relevant to fraud cases.

It is no answer to emphasize, as the Fourth Circuit does (Pet. App. 25a-30a), that petitioners benefited in some loose sense from the sale of securities of the company under discussion. Just as the libel suit against a public individual is not exempt from the First Amendment merely because a newspaper profits from selling editions containing libelous statements, the fraud suit based on disinterested financial information is not exempt from the First Amendment merely because the speaker in some abstract sense has an interest in the financial information. The type of interest in the company under discussion that the Fourth Circuit attributed to petitioners—*e.g.*, that increased stock prices could make their publications more popular—even if accurate is far too attenuated to affect the First Amendment calculation that favors protecting robust and sometimes mistaken public discourse regarding financial affairs.

The court of appeals' failure to consider the protections required by *New York Times* and *Bose* was determinative of the outcome of this case. Under § 10(b) of the Securities Exchange Act of 1934, the knowledge or recklessness required need only be proved by a preponderance of the evidence, not by clear and convincing evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). In contrast to the Illinois law in *Telemarketing*, § 10(b) does not contain the constitutional protections described in *New York Times*. Thus, unlike the defendants in *Telemarketing*, the defendants in this case were punished for speech on a matter of public concern using an evidentiary standard lower than that of *New York Times* and its progeny.

The securities fraud judgment here rests on the thinnest of reeds. After resolving based on competing trial testimony that the source did not tell the journalist a particular fact, the district court "inferred" that the petitioner "must have known" that his reporting was false, and the court of appeals simply affirmed on that basis. Pet. App. 19a. But had the higher standard of proof required by *New York Times* been applied here and had independent appellate review of factual issues been conducted, this judgment based on a dispute between source and publisher could not stand.[7]

B. Numerous Other Courts Of Appeals Have Held That First Amendment Protections Apply To Actions Based On Disinterested Financial News And Commentary.

Courts of appeals have applied the constitutional protections described in *New York Times* to causes of action based on financial commentary. As one court explained, "a plaintiff may not avoid the protection afforded by the Constitution ... merely by the use of creative pleading." *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (applying *New York Times* protections to state-law "tortious interference" claim).

Following that reasoning, courts of appeals have applied the *New York Times* requirements to various

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[7] Because the failure to apply First Amendment protections determined the outcome below, this case presents a particularly appropriate vehicle for the Court to address the role of the First Amendment in protecting financial news publishers and writers.

suits involving allegedly false financial news and commentary. *See, e.g., Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 856-58 (10th Cir. 1999) (state-law intentional interference with prospective business relations claim related to securities); *Compuware Corp. v. Moody's Investors Servs.*, 499 F.3d 520, 531 (6th Cir. 2007) (breach of contract claim based on reports about a public corporation by a financial ratings company); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990).

So too, numerous courts of appeals have followed *Bose* and applied independent review to determine whether speech falls within protected categories. These courts have conducted "an independent examination of the whole record in order to make sure that the speech regulation does not constitute a forbidden intrusion on the field of free expression." *Revo v. Disciplinary Bd. of the Sup. Ct.*, 106 F.3d 929, 932 (10th Cir. 1997); *see also Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) ("Whether free speech rights have been infringed presents a mixed question of law and fact reviewed de novo"); *Falanga v. State Bar*, 150 F.3d 1333, 1335 (11th Cir. 1998) ("Where, as here, the parties to a First Amendment case dispute only the district court's findings of constitutional ... fact, our standard of review is de novo.").

In departing from these *Bose*-related precedents, the decision below deepens an existing circuit conflict. Like the Fourth Circuit below, the D.C. Circuit has declined to apply *Bose* review in these circumstances. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42 & n.3 (1985); *Novartis Corp. v. FTC*, 223 F.3d 783, 787 n.4 (2000); *Philip Morris v.*

United States, 566 F.3d 1095, 1110 (2009). Petitions for certiorari are currently pending in *Philip Morris*, presenting the question "Whether the court below erred by failing independently to review the facts relating to the constitutional protection of Defendants' speech, in contravention of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)." *See* Pet. of R.J. Reynolds Tobacco Co. at i (filed Feb. 19, 2010) (No. 09-977).

II. Whether The First Amendment Applies To Fraud Actions Based On Disinterested Financial News And Commentary Is An Important And Urgent Question

Disinterested financial news reporting and commentary play a critical role in public discourse and economic activity. Immediate review is warranted because the First Amendment protections afforded by *New York Times* and *Bose* but called into question by the decision below encourage speakers to provide the public with necessary financial information.

First, as this Court has recognized, financial news and commentary about public companies facilitates efficient functioning of the markets. Publishers of financial news and commentary "ferret out and analyze information," often, as here, "by meeting with and questioning corporate officers," and "information that [they] obtain normally may be the basis for judgments as to the market worth of a corporation's securities." *Dirks v. SEC*, 463 U.S. 646, 658-59 n.17 (1983) (quotations omitted). This enhances "market efficiency in pricing" and "redounds to the benefit of investors." *Id.* at 659 & n. 17 (quoting 21 S.E.C. Docket 1401, 1406 n.18 (1981)).

Second, the public wants financial news and commentary about particular companies. With the modern day phenomenon of direct consumer investing, the need for disinterested stock market information is at an all-time high. Many people have retirement and other life-event funds invested in stocks; information relevant to these investments is of surpassing importance to these investors. *See* Pet. App. 42a ("financial news and commentary is especially important [today] because so many Americans are actively involved in trading in the securities markets and there is a high demand for information about investment opportunities"). As a result, today's news outlets are filled with financial news and commentary regarding the stock market prospects of particular public companies.

In particular, financial news and commentary often involves, as here, a writer reporting on a statement by a company representative concerning the timing of an event of economic consequence for the company. For instance:

- Financial reporters quoted statements by a company representative concerning a large acquisition, and wrote that the company "expects the deal to close by April 30." Kris Maher & Ben Casselman, *Coal Giant Consol Is Latest To Buy Gas*, Wall St. J., Mar. 16, 2010.
- A financial reporter quoted statements by a company representative concerning a "blockbuster" pharmaceutical and reported that the company expected regulatory approval soon. Thomas Gryta, *Auxilium May*

Reward Investors, Wall St. J., Oct. 21, 2009.

- Financial reporters quoted statements by a representative of American International Group Inc. that he was "confident" that a very large sale "would be completed." Serena Ng & Joann S. Lublin, *Benmosche Upbeat on AIG Prospects*, Wall St. J., Apr. 2, 2010.

The universe of financial news and commentary concerning particular public companies is extensive.[8]

Third, the current financial crisis has focused the public on financial matters as never before. The finalists for the 2009 Pulitzer Awards included the staff of the *Wall Street Journal* for "highly detailed coverage of the collapse of America's financial system, explicating key decisions, capturing the sense of calamity and charting the human toll." *See* 2009 Finalists, *available at* http://www.pulitzer.org/finalists/2009 (last visited Apr. 28, 2010). Similarly, an article in the *New York Times* was recognized "[f]or its comprehensive coverage of the economic meltdown of 2008, setting a standard for depth and sophistication while making the arcane world of finance and banking accessible to an often

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[8] *See, e.g.*, Brian Bandell, *BankUnited CEO: Big Deal is Coming*, South Florida Business Journal, Nov. 10, 2009; Rick Rothacker & Patrick Scott, *Wachovia Eyed Big Buffett Investment*, Charlotte Observer, Oct. 16, 2008, at 1A; Steven Pearlstein, *At Constellation, Not a Star Performance*, Wash. Post, Apr. 24, 2009, at A13; Vivian Marino, *Trying to Gauge the REIT Rebound*, N.Y. Times, June 21, 2009, at Bus. 14.

bewildered public." *Id.* The financial press also warned the public about the imminent crisis.[9]

The Fourth Circuit's decision withdrawing any First Amendment protections for disinterested financial news and commentary will chill necessary and useful speech. Sources often have their own financial interests at stake in financial reports, as did the source (a company employee) at issue in this case. Giving sources the power to bring a suit any time they can credibly deny making a material statement is a serious threat to financial reporting. The mere threat of a costly lawsuit, for which this case could set a precedent, would force many media outlets to avoid these types of stories altogether. This result would significantly chill journalists' ability to report on financial news and deliver information vital to the public interest in an "uninhibited, robust, and wide-open" manner. *N.Y. Times*, 376 U.S. at 270.

So too, independent appellate review of the facts that render speech unprotected is essential for reporters to safely publish financial news. As demonstrated by the opinion below, under the "clear error" standard, the factual decision crucial to protecting the speech (*i.e.* whether or not the speech was intentionally or recklessly false), is made only once, by the trial judge, and only by a preponderance of the evidence. If there is any basis at all in the record for

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[9] *See, e.g.*, Mara Der Hovanesian, *Nightmare Mortgages*, Business Week (Sept. 11, 2006); *see also* Chris Roush, *Unheeded Warnings*, American Journalism Review (December/January 2009); Dean Starkman, *Power Problem*, Columbia Journalism Review (May/June 2009) (listing over seven hundred financial press stories related to the financial crisis).

the trial judge's determination, and if the trial judge simply does not like the defendant, then the reporter has no outlet through which to appeal the factual finding and the application of law to facts underlying that decision. As with the determination of whether the defendant published something with actual malice, this factual determination is critical in determining whether or not a reporter is liable. Denying an outlet for de novo appeal of that determination would seriously undermine the free speech of journalists.

III. The Respondent Is Not Aided By The Commercial Speech Doctrine

The publications at issue cannot be stripped of First Amendment protection simply by labeling them "commercial" speech. The government argued below that the publications at issue in this case are commercial speech and so not entitled to constitutional protection.[10] The district court agreed with the government, and held that the publications "are commercial speech entitled to lesser protection under the First Amendment than [] pure speech." Pet. App. 85a. The court of appeals did not explicitly address the issue, because it concluded that whatever the nature of the speech, "[p]unishing fraud ... simply does not violate the First Amendment." Pet. App. 49a. In light of the government's position below, *amicus* addresses here the question of whether the Fourth Circuit's decision can be saved by invoking the commercial speech doctrine. It cannot.

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[10] *See, e.g.*, Br. of SEC at 48 & n.8, *SEC v. Pirate Investor LLC* (4th Cir. 2009) (No. 08-1037).

1. Commercial speech is that which "does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (quotation omitted); *id.* at 778 (Stewart, J., concurring). To clarify that definition, this Court in *Bolger v. Youngs Drug Products Corp.*, articulated three necessary characteristics of commercial speech: (1) that the speech be an "advertisement," (2) that the speech makes "reference to a specific product," and (3) that the speaker "has an economic motivation." 463 U.S. 60, 66-67 (1983). None of these factors is sufficient by itself for a finding of commercial speech; only "[t]he combination of all these characteristics" provides support for classifying speech as commercial. *Id.* at 67.

It follows that disinterested financial commentaries, including reports, projections, and opinions about a marketable security, are not commercial speech. As this Court stated in *Lowe v. SEC*, 472 U.S. 181 (1985), "because we have squarely held that the expression of opinion about a commercial product such as a loudspeaker is protected by the First Amendment, it is difficult to see why the expression of an opinion about a marketable security should not also be protected." *Id.* at 210 n.58 (citing *Bose*, 466 U.S. at 513). Accordingly, the courts of appeals have consistently held that financial commentary is fully protected by the First Amendment. *See, e.g., SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365, 371-73 (2d Cir. 1988) (holding that articles in *Stock Market Magazine* that portrayed firms as appealing investment prospects were not commercial speech); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180 (4th Cir. 1998) (holding that a *Forbes* magazine article urging readers to sell overvalued stock was constitutionally

protected); *United States v. Wenger*, 427 F.3d 840, 848 (10th Cir. 2005) (reiterating that "disinterested investment advice" qualifies "for full First Amendment protection").

2. Under this established precedent, the USEC Special Report is not commercial speech. The Report is no different than an article reviewing the sound quality of loudspeakers or a financial magazine commenting on the strengths and weaknesses of a public company. These publications may ultimately lead to a commercial transaction, if the reader acts on the opinion provided and purchases a loudspeaker or a stock. But while the speech refers to a specific product (*i.e.*, the stock described) it is not an advertisement and the speaker has no economic motivation related to the product.

The Super Insider Tip E-mail, even though it is promotional, also is not commercial speech. The "product" that the E-mail advertises—the Special Report—is itself protected speech. When the product being advertised is itself protected speech, the advertisement should not be classified as commercial. A contrary result—which would protect statements and opinions about stocks when they appear in reports, investment newsletters and financial news articles, but strip that protection when those statements are reprinted in advertisements or promotional materials—would undermine the significance of the First Amendment. Excerpts from a new novel appearing on an author's website should not receive lesser protection than the book itself. A preview of a documentary film should not receive lesser protection than the film itself.

Courts confronting these circumstances have properly recognized that an advertisement for non-commercial speech is not commercial speech. In *National Life Insurance Co. v. Phillips Publishing, Inc.*, 793 F. Supp. 627 (D. Md. 1992), the court held that a financial analyst's promotional materials advertising a newsletter could not be classified as commercial speech. The court held that such a "broad definitional sweep would, if applied without further thought, transform too much noncommercial speech into commercial statements." *Id.* at 643. The fact that some of the contested statements happened to appear in promotional materials as well as in the newsletter did not make them commercial speech. "Such a fortuity should not transform the character of their content into commercial speech, just as the quality of wine does not depend on the shape of the vessel in which it is carried." *Id.* at 644.[11]

Moreover, under this Court's decision in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988), the promotion is so intertwined with the Report itself that it cannot be left unprotected. In that case, the Court explained

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[11] The court in *Lane v. Random House*, 985 F. Supp. 141 (D.D.C. 1995), applied similar reasoning to an advertisement for a book about the Warren Commission and the Kennedy assassination. The court held the advertisement was not commercial speech and so was entitled to full First Amendment protections. That was because "the underlying product is a book" and "it is essential to identify and protect advertising which summarizes an argument or opinion contained in the book." *Id.* at 152 (internal quotations omitted). As the court explained, "the challenged advertisement is not about laundry detergent; it cannot be divorced from the book ... and the book is protected speech." *Id.*

that proposals of economic transactions in the form of charitable solicitations are not commercial speech where "the component parts of a single speech are inextricably intertwined," so that the Court "cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Id.* Even though the solicitations were, in part, commercial proposals, the Court still "appl[ied] our test for fully protected expression." *Id.* In this case, the tip E-mail was "inextricably intertwined" with the Special Report: it summarized and paraphrased the contents of that report. Although some phrases in the e-mail proposed a commercial transaction, it would be "artificial and impractical" to therefore strip the entire document of First Amendment protections.

3. Classifying financial reporting or opinion commentaries as commercial speech would have grave consequences. It would render the thousands of television programs, magazines, newspaper columns, newsletters, books, and websites that provide financial reporting without the protections of the First Amendment. At a time of enormous financial uncertainly and upheaval in the journalism industry, writers and publishers need to be able to advertise their work and entice readers to consume it. Eliminating full constitutional protection for promotion of speech would deter journalists and publishers from working to distribute their speech to a broader audience. For these reasons, the Court should reaffirm that publications like the Special Report and E-mail are not commercial speech.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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